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# UNTANGLING COMPETING CONCEPTIONS OF "EVIDENCE"

Scott W. Howe\*

## I. INTRODUCTION

In law there is no single conception of "evidence." I do not mean merely that we disagree about how to refine a vague—but shared—view of evidence. I mean that we lack a single understanding of evidence as a basic idea. Evidence conveys fundamentally different notions at once.<sup>1</sup>

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1. The view frequently emerges that trial results should reflect the evidence, which suggests the need for attention to what evidence means. See, e.g., *United States v. Keiswetter*, 860 F.2d 992, 996 (10th Cir. 1988) (en banc); see also Anjili Soni & Michael E. McCann, *Twenty-Fifth Annual Review of Criminal Procedure: II. Preliminary Proceedings*, 84 GEO. L.J. 887, 1061 n.1406 (1996) (citing appellate decisions reviewing whether evidence provided an adequate factual basis for trial court results); Diana Garcia, Comment, *Remittitur in Environmental Cases: Developing a Standard of Review for Federal Courts*, 16 B.C. ENVTL. AFF. L. REV. 119, 133 (1988) (stating that an award after remittitur should reflect the maximum possible recovery supported by the evidence). Model jury charges used in various federal courts include an instruction directing jurors to decide the case before them based on the evidence. See *infra* note 89. Appellate courts also commonly assert that the results in trials should generally represent a good faith effort by the trier to reach a verdict consistent with the evidence. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (striking down a conviction on grounds of prejudicial pretrial publicity and noting that the test of individual impartiality for prospective jurors who have been exposed to news about the case is whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"), quoted with approval in *Murphy v. Florida*, 421 U.S. 794, 800 (1975). This assertion deserves some qualification. We allow jurors in criminal cases to acquit defendants who appear guilty though we do not advise jurors of this "nullification" power. See Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 52-56 (1980). Also, some questions presented to jurors turn on value judgments to a greater extent than others. See Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1182 (1995). Examples of situations calling

Lawyers normally speak of evidence in relation to certain kinds of sources from which information emanates.<sup>2</sup> Further, lawyers are accustomed to thinking of the sources of evidence as narrowly circumscribed. Typically, lawyers view evidence as coming from only four places: (1) the assertions of witnesses testifying under oath; (2) exhibits introduced by the parties; (3) stipulations between the parties; and (4) statements of judicial notice by the trial judge.<sup>3</sup> Other factors may also legitimately influence the fact finder. However, under this "four-sources" conception,<sup>4</sup> these additional inputs do not constitute evidence.

At the same time some lawyers contend that evidence encom-

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for triers to express openly their value judgments include capital sentencing and obscenity prosecutions. See generally Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989 (1994) (noting the uncertainty that any societal view exists about how to assess the blame due a capital offender); Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 624 (1989) (noting the trier's judgment decision in determining if a work should be condemned due to its "prurient appeal" and its "patent offensiveness"). Apart from these qualifications, the idea survives that trial verdicts should reflect the evidence. See, e.g., *Keiswetter*, 860 F.2d at 996.

2. Lawyers also sometimes use the term "evidence" in relation to a set of procedural rules—certain laws governing the conduct of hearings. However, my focus here is on how lawyers think of the inputs themselves.

3. This view of what constitutes evidence is demonstrated most clearly by the model instructions promulgated by various United States circuit courts for use in federal trials. See *infra* notes 86-90 and accompanying text.

4. With the term "four-sources conception," I mean to include definitions of evidence that are even more restrictive than the conception represented in the text as well as those that are slightly more expansive. Some dispute exists around the fringes of the restrictive conception of legal evidence. For example, some contend that judicially noticed facts do not involve the presentation of evidence but rather exemplify facts established in lieu of evidence. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 837 (3d ed. 1996) ("Judicial notice of adjudicative facts . . . serves as a substitute for evidence."). The same kind of argument could be made for statements regarding factual stipulations between the parties. See, e.g., April Anstett, *California Supreme Court Survey: February 1994-December 1994*, 22 PEPP. L. REV. 1675, 1688 (1995); Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the Daubert Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55, 71 (1995). Likewise, some have argued that a jury view of a scene outside the courtroom is in the nature of real evidence although others claim that it is only an aid to understanding the evidence. See, e.g., JACK B. WEINSTEIN ET AL., *CASES AND MATERIALS ON EVIDENCE* 132 (8th ed. 1988) (noting that authorities are divided on this question). In the opposite direction, some dispute exists over whether witness demeanor should be viewed as evidence and, if so, to what extent. See *infra* note 15 and accompanying text. These disagreements around the margins of the restrictive conception do not undermine my central point that lawyers often tend to conceive of legal evidence as encompassing only a fraction of the sources of information legitimately relied upon by the fact finder.

passes everything that legitimately influences the fact finder.<sup>5</sup> Some scholars contend that evidence, in general parlance, includes any legitimate grounds for a belief, anything that tends to prove or disprove a proposition.<sup>6</sup> Under this view, legal evidence is much broader than the restrictive four-sources conception. For example, fact finders can legitimately rely on witness demeanor, facts learned through a formal view of an event scene, and knowledge that they possess before the beginning of the trial. Also, the questions and arguments of counsel, the demeanor of the parties, and the legal instructions applicable to the case often provide information that fact finders legitimately consider in reaching factual conclusions. Under a more expansive conception, a wide variety of sources provide evidence.

The failure to recognize the existence of these different conceptions of evidence poses problems. Lawyers often confuse these two ideas when they refer to the evidence in a case. Lawyers frequently think of the four-sources conception as defining what qualifies as evidence. Yet, they also often erroneously think that the evidence—as defined by the four-sources conception—encompasses everything that legitimately influences the fact finder. Thus, the four-sources conception comes to define, incorrectly, the legitimate aspects of proof.

This tendency to muddle the two different conceptions of evidence infects broad segments of legal discourse and carries significant consequences. The confusion invades how legal academics

5. See, e.g., sources cited *infra* note 101.

6. See, e.g., 1 JAMES M. HENDERSON, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES 3 (1926) (noting that in ordinary usage "'evidence' is understood to be anything that makes evident or clear to the mind, or such things collectively; any ground or reason for knowledge or certitude in knowledge; proof whether from immediate knowledge or from thought, authority or testimony; a fact or body of facts on which a proof, belief or judgment is based; that which shows or indicates"); Morris D. Forkosch, *The Nature of Legal Evidence*, 59 CAL. L. REV. 1356, 1357 (1971) (noting that, in nonlegal contexts, any item, including merely a view or belief, may be evidence of a proposition "so long as those who consider the item feel that it is worthy of being appraised and evaluated").

Professor Thayer asserted long ago that differences exist between legal and nonlegal discourse over the idea of evidence. For example, he declared that evidence in the legal context, unlike in other social contexts, does not include preexisting knowledge of the fact finder relevant to its resolution of a factual question. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264 (1898). For more on Thayer's view, see *infra* notes 68-74 and accompanying text.

While this more all-encompassing conception of evidence may find its source in general parlance, it also has influenced legal discourse about evidence. See *infra* text accompanying notes 96-149.

teach evidence, how lawyers litigate cases, and how judges instruct juries and respond to a variety of alleged trial errors. The confusion and its deleterious effects warrant reexamination of how we conceive of evidence, which is the central function of this Article.

This Article proceeds in five stages. Part II demonstrates that triers of fact legitimately find facts based heavily on information that does not qualify as evidence under the four-sources conception. I participated as a lawyer in a criminal trial that illustrates this point. Although this account dramatically underscores that the legitimate influences on fact finders extend well beyond the four-sources definition of evidence, the same point applies in all juridical, fact finding contexts.

The Article then focuses on the conflation problem that muddles our thinking about the proof process. Part III shows that the four-sources conception has come to dominate lawyers' view of evidence. Part IV then demonstrates that lawyers sometimes tend to understand evidence as encompassing all that permissibly influences a trier's factual findings. As part of this discussion, this Article discusses how lawyers often confuse the first conception with the second by concluding that evidence includes only information within the four-sources conception and that these inputs encompass all that legitimately influences the fact finder. This Article also illuminates the ill effects in various legal contexts of this improper intermingling of the separate conceptions of evidence.

Part V turns to the question of remedy. I address whether, if we could reinvent our discourse, we would best define legal evidence according to the four-sources conception or, instead, as all of the informational inputs legitimately influencing the fact finder. While arguing that we would best choose the broad conception of evidence over the four-sources conception if we could choose between them, this Article ultimately concludes that we cannot expect to secure any consensus about the meaning of legal evidence. Based on our inability to agree on a single conception, lawyers must simply acknowledge the dual conceptions and strive to avoid muddling them.

Part VI underscores the benefits to be achieved from untangling our dual conceptions of evidence. Keeping the two conceptions separate does not lead to easy answers about what information a fact finder should consider or what information an appellate court reviewing the rationality of a verdict legitimately will employ. This Article's aim is not to define the boundaries of legiti-

mate proof, but is to demonstrate the more basic point that avoiding confusion of the dual conceptions of evidence removes an important obstacle to rational thinking concerning the boundaries of legitimate proof. The conceptual confusion leads to the erroneous conclusion that legal fact finders, in every context, appropriately weigh only information embodied by the four-sources. By acknowledging that the four-sources conception does not define legitimate proof, lawyers force themselves to recognize that fact finding will and, indeed, should encompass a broad sphere of influences. Further, lawyers must justify the boundaries of legitimate proof other than by merely citing this restrictive view of evidence.

## II. A JURY'S FACTUAL FINDINGS IN A ONE-WITNESS TRIAL

Many years ago, while a lawyer with the Public Defender Service (PDS) in Washington, D.C., another PDS lawyer and I defended a nineteen-year-old man named Robert Dixon (Dixon). Our experience in the *Dixon* case vividly demonstrates that much of the information that legitimately persuades jurors to reach factual conclusions does not fall within the four-sources conception of evidence. Although this case underscores the message in a striking way, the same point applies in various degrees to virtually all trials.<sup>7</sup>

The indictment charged our client and an eighteen-year-old codefendant, Bryan Dobbs (Dobbs), with armed robbery and assault with intent to kill. The victim, Vernon Vinson (Vinson), was a man in his early twenties. On an evening in late June, Dixon and Dobbs allegedly stabbed Vinson in the neck with a knife and robbed him of one hundred dollars.

A police detective provided information at the preliminary hearing that revealed more details of Vinson's account. Vinson had known the defendants for many years, as they all had grown up on Capitol Hill where Vinson still lived. On the evening of the incident, Vinson ran into Dixon and Dobbs at the home of a mutual friend who lived near Vinson. The codefendant, Dobbs, asked Vinson if Vinson could give Dixon and Dobbs a ride to northwest Washington. Vinson agreed, but first drove to his own home and went inside to obtain something. He alleged that, moments after

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7. In telling the story of the investigation and the trial, I have changed the names and some of the facts to safeguard privacy interests.

he reentered the car, he was attacked and robbed. According to detectives who interviewed Vinson in the hospital, the codefendant, Dobbs, stabbed Vinson in the side of the neck from behind. Simultaneously, our client, Dixon, snatched a one hundred dollar bill from Vinson's right pants pocket. When Dixon and Dobbs fled, Vinson drove away, attempting to gain assistance. A police officer pulled him over for reckless driving about three miles north of the scene of the stabbing. Upon seeing Vinson's condition, the officer called an ambulance. The ambulance transported Vinson to the nearby Washington Hospital Center, which admitted and treated him.

Vinson's account did not ring true. First, a police report indicated that Vinson told the officer who stopped him, "Six guys jumped me and robbed me as I was walking from my car to my house." The conflicting statement suggested that Vinson was trying to cover up something. That Vinson drove so far from the scene of the incident to obtain help was also peculiar. Although he was stopped only a few blocks from the Washington Hospital Center, there were two hospitals in the immediate vicinity of the stabbing. His failure to seek help at those facilities could suggest that he was trying to avoid the authorities.

We hypothesized that Vinson was stabbed in a drug deal gone sour. In addition to Vinson's possible efforts to cover up, we learned that he had previously been arrested for drug dealing. Although only convicted for marijuana possession, Vinson had been arrested for selling heroin.<sup>8</sup> He originally received probation for this offense, but a judge revoked his probation several months after the stabbing because Vinson tested positive several times for cocaine consumption. We also found a woman named Wanda Winters, who lived near Vinson, and who told us that she saw Vinson dealing drugs in the neighborhood on several occasions. She also told us she was in the car with Vinson and both defendants on the night of the incident and had witnessed the codefendant, Dobbs, buy from Vinson a fairly large amount of marijuana supposedly laced with phencyclidine.<sup>9</sup> She left the car, however, be-

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8. Police saw Vinson selling drugs in front of a high school. When arrested, Vinson had six small bags of heroin and several ounces of marijuana in his pocket. Based on a lenient bargain, he later pled guilty to marijuana possession, and the heroin charges were abandoned.

9. She was in the car because she was a friend of all three men. It was clear from informal comments made by the prosecutor, however, that he planned to try to discredit her on grounds that she had been romantically involved with our client, Dixon.

fore the stabbing.

We also located Theresa Gibbons (Gibbons), the common law wife of Vinson, who gave us helpful information. She said that on the day of the stabbing, Vinson dropped her off at the Washington Hospital Center because she was suffering complications in the late stages of pregnancy. She had given Vinson five hundred dollars in cash that afternoon with instructions to take it to her aunt, Wilhelmina Wilson, who was going to make the deposit on a new apartment for them. Gibbons next heard from Vinson the following morning on the telephone. To her surprise, Vinson told her he was at the same hospital and not simply as a visitor. He told her he had been stabbed and was admitted as a patient. Gibbons was allowed to visit Vinson a few minutes later. During the visit Vinson told Gibbons that, after the stabbing, he drove to the home of Gibbons's aunt, Ms. Wilson, because she was a nurse and could treat him. However, when he showed up at her door in the middle of the night, she told him to go directly to the hospital. Gibbons told us that Ms. Wilson lived about two miles north of the street where Vinson was stopped by the police officer. Thus, it became clear that Vinson passed the Washington Hospital Center driving away from the stabbing and was stopped while driving south toward the scene of the stabbing rather than north away from it.

Gibbons said she asked Vinson if he had given the money for the apartment to her aunt. He told Gibbons that he had but that some of the money was "missing." He also told her that police detectives were coming to visit him shortly. Gibbons admitted having been furious with Vinson for losing part of the deposit money. She told us that she said to Vinson: "You better tell them something good because I want that missing money back."

The investigator and I then located Ms. Wilson. She was very cooperative and her story coincided with Gibbons's. She told us that, on the night of the incident, Vinson pounded on her front door at about 1:00 a.m. She got out of bed and opened the front door. She found Vinson bleeding profusely at the neck. She also noticed several bills protruding from his right pants pocket. She asked him what happened. Vinson said: "Two guys tricked me into an alley and stabbed and robbed me." She pulled the money from his pocket, which turned out to be two one hundred dollar bills. She looked at his neck and told him that he should go immediately to the nearby Washington Hospital Center. Vinson then ran to his car and drove away.



Our theory was becoming more detailed. We hypothesized that Vinson used three hundred dollars of the deposit money from Gibbons to purchase drugs. He then attempted to sell the drugs for a profit. He sold one hundred dollars worth of drugs to the co-defendant, Dobbs, but Dobbs was dissatisfied. The argument and stabbing occurred when Vinson refused to return Dobbs's money. Dobbs stabbed Vinson to get back his money and, indeed, took back only one hundred dollars. Vinson hid or disposed of the remaining drugs shortly after the stabbing. Most important, our client, Dixon, was innocently present during the events. He was only trying to secure a ride to northwest Washington. Moreover, Vinson obviously had reason to lie about the incident and to falsely implicate our client. Vinson knew Dixon was a witness to what actually occurred and, to put Dixon on the defensive, Vinson alleged that Dixon assisted Dobbs with the purported robbery and stabbing.

At the trial the jurors fully adopted our factual hypothesis although they heard little evidence, as conventionally conceived, to support it. In opening statements I outlined our theory that the codefendant, Dobbs, alone had stabbed Vinson in a dispute over a drug transaction. I emphasized Vinson's effort to obtain help from his girlfriend's aunt rather than the authorities and his inconsistent statements to the first police officer and the aunt.<sup>10</sup> I asserted that jurors would conclude that our client, Dixon, was innocently at the scene of the stabbing.

Unexpectedly, Vinson was the only witness who testified at the trial. The prosecutor spent about fifteen minutes bringing out Vinson's story of being stabbed during a robbery. The prosecutor also brought out Vinson's prior conviction for drug possession to take the sting out of our anticipated impeachment of him. However, Vinson did not mention that, before being pulled over by the police, he had gone to the house of his girlfriend's aunt, where she had taken two hundred dollars that was hanging from his pocket, or that he had given inconsistent statements about the stabbing.<sup>11</sup>

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10. The prosecutor's opening only outlined a bare bones story that coincided with the account Vinson had given the detectives. Dobbs's lawyer, who spoke after me, simply encouraged the jurors to wait until the end of the trial before reaching any factual conclusions.

11. We asked ourselves why the prosecutor had not brought out Vinson's visit to Ms. Wilson's house that night. We suspected that the prosecutor did not know about the visit. No mention of the visit appeared in Vinson's grand jury testimony. Because the judge ordered us to proceed immediately with the first witness after the opening,

My colleague's cross-examination of Vinson made him look foolish.<sup>12</sup> She secured Vinson's concession that he had driven to Ms. Wilson's house. When she noted that he did not tell the grand jury about this, he said, implausibly, that he forgot about those events until that moment. He also admitted that he passed three hospitals on his route away from the scene of the stabbing. My colleague then asked if he drove to Ms. Wilson's house because he wanted to avoid an inquiry by the authorities. Vinson denied this contention but offered no better explanation. His demeanor throughout the cross-examination also undermined his credibility. He frequently offered halting responses as if he were thinking about the best answer rather than simply reciting the truth. Further, he did not deny the accusations leveled against him with much emphasis.

My colleague also elicited from Vinson details about the purported robbery that made Vinson's account appear improbable. First, she asked Vinson if his girlfriend gave him five hundred dollars to deliver to her aunt. Vinson denied this but later admitted it. Vinson later conceded that the money was in his pocket throughout the evening and ultimately was taken by Ms. Wilson, who saw it hanging from his pocket. Vinson first denied that any of the money was missing and then suggested that some of it may have been missing because he did not know how much money Ms. Wilson pulled from his pocket. However, my colleague asked rhetorically, "So you're telling the jury that someone robbed you of one hundred dollars, but left several hundred dollars hanging from your pocket?" Vinson asserted that this was true.

My colleague also sought to show that Vinson bought drugs that he then sold to the codefendant, Dobbs. However, little evidence—as conventionally conceived—supported these propositions. First, she asked Vinson if he had dealt drugs in the neighborhood for several years. Vinson denied it. She then asked if Vinson was arrested for selling heroin in front of a high school two years earlier. The prosecutor objected, but the judge allowed the question. Vinson admitted that he was arrested for heroin distri-

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the prosecutor also had no opportunity to speak with Vinson between the openings and when Vinson took the stand.

12. Theresa Gibbons told us that the prosecutor made this comment. The conversation with Gibbons occurred outside the courthouse at the end of the day on which Vinson testified. I happened to see Gibbons entering the subway station and greeted her. She angrily said that she was not talking to me because the prosecutor told her we used what we learned from her to make Vinson look "like a fool."

bution but denied that he had been selling; he claimed that the several bags of heroin found on his person were for his own consumption. My colleague then asked Vinson to agree that he bought drugs with his girlfriend's money on the night of the incident and sold some to Dobbs. Vinson denied it. She then asked Vinson to agree that the stabbing stemmed from a dispute over the drugs Vinson sold Dobbs. Vinson again denied her allegation.

My colleague also focused on showing that Vinson had given inconsistent statements about the stabbing and that his girlfriend was furious at him for losing part of her money. In leading fashion, she asked Vinson about the statements we learned he made to the aunt and to the first police officer. She also asked Vinson to affirm our information as to his conversation with his girlfriend at the hospital. Vinson denied that any of the statements were made.<sup>13</sup>

When the trial continued the next morning, the prosecutor surprised us by announcing that the government would rest without calling any more witnesses. We decided that the jury would acquit our client, Dixon, at that point, so we rested without calling any of our witnesses. The codefendant, Dobbs, also rested. Hence, the judge announced that we would discuss instructions and move to the summations.

In her closing argument my colleague argued that Vinson was obviously deceitful, and she posed suggestive questions about what actually happened while also urging that Dixon was only innocently present. "Why was Vinson telling a lie if not to cover up something?" she asked. After recounting some of what Vinson admitted, she asked, rhetorically, "Isn't it likely that, since the person left money hanging from Vinson's pocket, he was only trying to get back what was rightfully his?" She also emphasized the undisputed testimony that Dobbs, not Dixon, stabbed Vinson. Although Vinson claimed that Dixon took his money, my colleague asserted that Dixon had nothing to do with it. She explained that Vinson would benefit from implicating Dixon because that tactic would put Dixon on the defensive, thus neutralizing him as a witness who could give a disinterested account of what actually hap-

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13. Counsel for the codefendant cross-examined Vinson for an additional fifteen minutes, underscoring points that already were made in the first cross-examination. The prosecutor asked Vinson only a few perfunctory questions on redirect, Vinson was excused, and the proceedings ended for the day.

pened.<sup>14</sup>

The jurors fully accepted our factual theory. They acquitted both defendants of the robbery charges. They also acquitted our client of assault with intent to kill. However, they convicted Dobbs of that allegation. These verdicts coincided with our theory but not with most of the story given by Vinson. Moreover, in conversation with some of the jurors after the trial, they told us that they found the facts to be as we had hypothesized. One of the jurors pointed out, incidentally, that Vinson followed a route after the stabbing that took him near a police station where he could have reported the robbery and received help if he were not trying to avoid the authorities. This point was not mentioned in the testimony.

How much evidence, as defined by the four-sources conception, supported our factual theory? Very little. Vinson admitted that a substantial amount of money was left hanging from his pocket when he was assaulted, and he conceded that he drove several miles to the home of his girlfriend's aunt while passing up chances to stop at hospitals with which he was familiar. He also admitted he was convicted of marijuana possession for an incident in which he possessed both marijuana and heroin. Yet, little other evidence, as defined by the four-sources conception, supported the jury's factual conclusions.

The jurors legitimately considered other information to reach the conclusion that the altercation was a drug deal gone sour. The jurors appropriately considered their assessment of the motivations of typical robbers to conclude that Vinson's account of robbers taking only a small portion of his money was highly implausible. Their sense of these motivations was not evidence under the four-sources conception. Yet, the jurors properly considered their own knowledge on this question. The jurors also appropriately relied on Vinson's demeanor on the stand measured against their expectations of the typical, innocent victim of a near-fatal robbery. This information was not evidence under the four-sources defini-

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14. Dobbs's lawyer argued, in essence, that Vinson's story was incredible and, therefore, doubt existed that any of the elements of either of the charges were established with respect to Dobbs.

The prosecutor argued that Vinson's story was basically true even if some of his testimony was troublesome. The prosecutor also argued that we failed to prove some of the statements about which we had asked Vinson and that this was an indication of the actual weakness of our attack on Vinson's credibility.

tion, though there is no dispute that the jurors could consider it.<sup>15</sup> Furthermore, the conclusion that all of this information suggested that Vinson lied was not simply a reason to doubt Vinson's account. Considered with his effort to implicate the defendants, the jurors concluded, based on their own experiences in the world, that Vinson's lying implied more—that he was trying to cover up his own wrongdoing. Again, the knowledge underlying this inference was not evidence, but it was surely appropriately considered. The conclusion that Vinson was hiding his own wrongdoing in turn led to the proper interpretation of Vinson's failure to pursue opportunities for help at public facilities; he was trying to avoid the authorities. In reaching this conclusion the jurors also considered Vinson's failure to stop at a nearby police station. Although that fact was not mentioned in the testimony, the jurors appropriately relied on this kind of indisputable information gained from living in the community. What, however, was Vinson trying to cover up?

Though it seems doubtful, perhaps our jurors inferred the answer simply from hearing Vinson's direct examination and his inconsistent statements on cross-examination. In any event, my opening statement and my colleague's questions suggested a hypothesis of a drug transaction gone sour between Vinson and Dobbs. The jurors evaluated this hypothesis against their own idea of what occurs on the streets of Washington and decided that it was more likely than any other hypothesis. They were not relying on evidence under the four-sources view in formulating and assenting to the hypothesis suggested in our opening statement, our questions, and our closing argument. Yet it was indisputably proper for them to consider and assent to it.

Furthermore, could jurors appropriately conclude that our client was uninvolved in the stabbing? Vinson's prevarications about other details as well as the perceivable benefit to him of falsely implicating Dixon supported the view that Vinson lied in claiming that our client took his money or otherwise manifested his assent to the stabbing. In considering Vinson's dishonesty regarding other events and in evaluating its meaning based on their own ex-

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15. The well-accepted view is that this information can be considered to decide whether the witness's testimony is credible but not as substantive evidence of a countervailing hypothesis. See, e.g., Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183, 192 (1985). However, we frequently do not classify this information as evidence even when conceding that it is properly used to decide whether to credit the witness. See *infra* text accompanying note 86 (detailing a representative jury instruction used in federal court).

periences with humans, the jurors were not relying on evidence as conceived under the four-sources view. Likewise, in adopting our proposed hypothesis of Vinson's motivations for falsely implicating Dixon and in using their own experiences to analyze it, the jurors were not relying on evidence under the four-sources conception. Nonetheless, the jurors were surely entitled to consider all of this information in deciding whether our client was an accessory.

The *Dixon* case, though not extraordinary,<sup>16</sup> demonstrates with unusual clarity that triers legitimately find facts based on information that does not qualify as evidence under the four-sources conception.<sup>17</sup> This account has not extracted the limits of informa-

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16. The same general point could be made in the context of a well-known trial. Consider the good-faith disagreements that arose over the accuracy of the Simpson verdict. See, e.g., Martin Gottlieb, *Racial Split at the End, as at the Start*, N.Y. TIMES, Oct. 4, 1995, at A1 ("Separated by a constant gap of about 40 percentage points, many whites seemed to hold fast to the belief that Mr. Simpson was guilty, while blacks believed as adamantly in his innocence."); Richard Morin, *Poll Reflects Division over Simpson Case*, WASH. POST, Oct. 8, 1995, at A31 (noting that 8 of 10 blacks interviewed said they agreed with the decision, including 66% who said they strongly approved, while 55% of all whites interviewed said they disapproved of the jury's decision, including 40% who expressed strong disapproval; further, 7 of 10 blacks expressed confidence that Simpson had not killed the victims while an equal proportion of whites expressed the opposite belief). The Simpson verdict underscored that fact finders rely heavily on background information that they bring with them to the trial. Obviously, some observers might have reached different conclusions than others because they did not see the same portions of the trial. However, good-faith differences of opinion about the accuracy of the verdict also must have existed among persons witnessing essentially the same trial proceedings. An explanation for these differing conclusions is that observers doubting Simpson's guilt relied on different funds of experiential knowledge to analyze the testimony and exhibits than those observers who thought Simpson guilty beyond a reasonable doubt. As Professor Burt Neuborne has noted, a person's construction of reality is necessarily built on experiential background. See Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 443 (1992). Hence, influences outside of the four-sources conception of evidence necessarily affect to a significant degree one's view of the facts.

17. Input falling outside the conventional four-sources view may also cause jurors to accept a view consistent with guilt rather than innocence. As noted, the jurors in the *Dixon* case ultimately convicted the codefendant, Dobbs, of assault with intent to kill according to a factual view constructed largely from non-four-sources evidence.

Another example of non-four-sources evidence producing a conviction focuses on Daniel Webster's argument for the Commonwealth of Massachusetts in the prosecution of John Francis Knapp for murder. See generally Walker Lewis, *The Murder of Captain Joseph White: Salem, Massachusetts, 1830*, 54 A.B.A. J. 460 (1968). In that famous case, Webster convinced a jury that Knapp had acted as a principal in the murder of a wealthy ship captain in the victim's bedroom although Knapp had been outside at the time of the murder. See *id.* Several commentators have concluded that influences beyond the testimony, particularly Webster's powerful summation, were essential to obtaining Knapp's conviction. See, e.g., MAURICE G. BAXTER, *ONE AND INSEPARABLE:*

tion that the jurors legitimately employed to find the facts in the case. Other information also might have influenced the jurors, such as portions of the court's instructions,<sup>18</sup> the contrasting demeanor of the two defendants while sitting at the counsel table,<sup>19</sup> the demeanor of the judge,<sup>20</sup> and other questions containing asser-

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DANIEL WEBSTER AND THE UNION 160 (1984) (contending that the effect of Webster's summation to the jurors was "powerful"); ALLAN L. BENSON, DANIEL WEBSTER 200 (1929) ("[H]e hanged . . . [Knapp] by bridging over with powerful oratory yawning gaps in his evidence."); 1 GEORGE TICKNOR CURTIS, LIFE OF DANIEL WEBSTER 384 (1870) ("The force of Mr. Webster's argument convinced the jury that Frank [Knapp] was, in this sense, present at the murder. But the fact was otherwise . . ." (citation omitted)); 2 CLAUDE MOORE FUESS, DANIEL WEBSTER 297 (1930) ("Webster . . . brought to bear all the influence of his powerful intellect and superb oratory, and, by so doing, ensured the condemnation of two bloodstained offenders."); John D. Lawson, *Preface to Volume Seven of AMERICAN STATE TRIALS* xii (John D. Lawson ed., 1917) ("It was Mr. Webster's matchless eloquence that won the verdict of guilty as a principal . . ."); HENRY CABOT LODGE, DANIEL WEBSTER 195 (9th ed. 1883) (noting that at a meeting in New York, "He uttered only a few stately platitudes, and yet every one went away with the firm conviction that they had heard him speak words of the profoundest wisdom and grandest eloquency."); Lewis, *supra*, at 464 (noting that many commentators credited Webster's advocacy skills as the basis for the guilty verdict).

The record of the *Knapp* case was preserved and remains widely available largely because of Webster's prosecutorial efforts. For the record of the trial, see *The Trial of John Francis Knapp for the Murder of Joseph White. Salem, Massachusetts, 1830* in 7 AMERICAN STATE TRIALS 395 (John D. Lawson ed., 1917).

18. A variety of instructions typically given to jurors are intended to affect their factual findings. In the *Dixon* case, for example, the judge instructed the jurors not to draw any inference of guilt from the defendant's failure to testify. As part of this instruction, the judge advised jurors that there are a variety of reasons why a defendant might decide not to testify that would not suggest his criminal guilt. This instruction would affect the factual conclusions the jurors might otherwise draw from the defendant's failure to take the stand. Trial judges also commonly give cautionary instructions advising skepticism regarding certain kinds of testimony such as that from children or witnesses testifying under a plea agreement. Trial judges also commonly give instructions alerting jurors to permissible inferences endorsed by the law. Examples would include instructions regarding missing witnesses or inferences to be drawn from a criminal defendant's possession of recently stolen property. All of these instructions seek to influence the jurors' factual determinations.

19. The difference in demeanor between the two codefendants favored Dixon who wore a three-piece suit throughout the proceedings distinguishing him from both Dobbs and Vinson obviously wearing prisoner garb. Dobbs was serving time on another charge on which he had been convicted between the time of the alleged crime and the trial. Vinson was also serving time because his probation had been revoked after the night of the incident. Dixon also was between us and, throughout the trial, sat erect, looked attentive, and appeared to take notes of the proceedings. Frequently, he engaged in whispered conversations with us, indicating the rapport we had developed. By contrast, the codefendant sat slumped in his chair, seemingly half asleep, several feet from his counsel who rarely spoke to him during the proceedings before the jury.

20. The jurors might not have sensed the judge's opinion of Vinson, but, for me, his manner conveyed a message of concern. It appeared that the judge studied Vinson with a furrowed brow as Vinson testified. He also was emphatic in overruling the

tions that Vinson denied.<sup>21</sup> Exploring the boundaries of the fact finders' legitimate reliance on information not viewed as evidence under the four-sources conception raises important questions.<sup>22</sup> It is sufficient for purposes of this Article, however, to establish merely that fact finders legitimately may employ much information that does not fall within the four-sources conception of evidence.

### III. THE DOMINANCE OF THE FOUR-SOURCES CONCEPTION OF LEGAL EVIDENCE

More than four-sources information legitimately influences fact finders, but lawyers usually understand evidence to include only four-sources material. This limited, source-based conception of evidence appears most clearly in jury instructions defining evidence.<sup>23</sup> The four-sources view is also frequently implicit in how

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prosecutor's objection to our inquiry about the details of Vinson's prior arrest on drug charges. Having been in the judge's courtroom on prior occasions, I recognized this demeanor as unusual.

21. For example, should jurors have considered questions from defense counsel that implied that Vinson had made certain contradictory statements? This problem is more difficult than may initially appear. It is not answered merely by asserting that lawyers' questions do not themselves provide useful information. As we have already seen, counsel's questions may provide hypotheses about factual events that we think jurors are entitled to consider even when the witness denies the hypotheses. It may seem inappropriate for jurors to have concluded that Vinson probably made the statements based on counsel's questions. However, it is not clearly correct to say that jurors should not have weighed the questions. What if Vinson, from his demeanor, seemed dishonest in his denials?

22. Commentary has appeared concerning the proper extent to which jurors rely on nonevidence under the four-sources conception to reach decisions. See, e.g., SIR RICHARD EGGLESTON, *EVIDENCE, PROOF AND PROBABILITY* 141-45 (2d ed. 1983) (describing modern English view on limits to appropriate use of background knowledge); Richard M. Fraher, *Adjudicative Facts, Non-Evidence Facts, and Permissible Jury Background Information*, 62 IND. L.J. 333, 353 (1987) (criticizing Mansfield's standard as unworkable and asserting that "it is the particular genius, and not some peculiar oversight, of the law that has led judges and jurists to look with studied indifference upon the question of what non-evidence facts the jurors may bring to court with them"); Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 688-702 (1990) (discussing effect of several nonevidence sources on juries, including the use of surrogate witnesses to present deposition testimony and the use of presumptuous cross-examination questions); John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 406-07 (1985) (focusing on proper limits of use by jurors of their background knowledge and proposing as the proper test "that a substantial number of people in the community have the information or hold the belief in question"); cf. A. Leo Levin & Robert J. Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139 (1956) (discussing limits on introducing new facts and ideas in attorney summation).

23. See *infra* notes 86-90 and accompanying text.



academics convey to law students what constitutes evidence and in the way that lawyers and courts at all levels discuss the term.

The central feature of the four-sources conception is the idea that evidence encompasses only a fraction of the input that legitimately influences fact finders. Under this conception evidence comes only from certain sources within the trial proceeding: testimony, exhibits, stipulations, and statements of judicial notice.<sup>24</sup> As the account of the *Dixon* trial in Part II underscores, fact finders legitimately employ much more than these four sources of information to resolve factual issues. This additional input does not constitute evidence under the four-sources conception. However, this is not problematic because the four-sources conception does not require that triers must rely only on evidence to find facts.

Legal evidence has not always been limited to the four-sources conception. In medieval England jurors were expected to possess or obtain information on their own.<sup>25</sup> Under this system the courtroom trial was not an important source of information for resolving litigated factual contentions.<sup>26</sup> Much evidence was embodied in jurors' background knowledge and in the input they gained through personal investigations. By the mid-sixteenth cen-

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24. See *infra* notes 86-90 and accompanying text.

25. In the thirteenth century jurors were expected "to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony; they must weigh it and state the net result in a verdict." 2 SIR FREDERICK POLLOCK & SIR FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 625 (2d ed. 1899) (footnote omitted); see also GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL* 5 (3d ed. 1963) ("At first the jury were judges and witnesses together, since they acted on their own supposed knowledge, fortified by village gossip."). Medieval juries have commonly been described as "self-informing." See, e.g., THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE* 16 (1985).

Some legal historians assert that early jurors reached verdicts based primarily on personal knowledge gained out of court. See 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 333-34 (6th rev. ed. 1938). But see GREEN, *supra*, at 14 (contending that in criminal cases, "the trial jurors gave their verdict in open court, not only upon their prior knowledge but also upon their viewing of the confrontation between the accused and the bench").

26. Beginning in the fourteenth century, witnesses were called to testify publicly before the jury, but the distinction between witnesses and jurors was not complete, as the two groups often joined in reaching a verdict. See John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 204 (1988). Moreover, jurors were still expected to have or discover information on their own so that the trial remained only a partial source of factual information. See THAYER, *supra* note 6, at 170.

For a short history surrounding the implementation of the jury in England, see JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 118-29 (1960).

tury juries had become less self-informing, but it was still appropriate for them to rely on knowledge of facts gained outside of the trial.<sup>27</sup> Indeed, even a century later in the landmark decision in *Bushell's Case*,<sup>28</sup> Chief Justice Vaughan concluded that a trial judge could neither direct a verdict for the prosecution nor fine jurors for a verdict conflicting with his direction because jurors might have knowledge of relevant facts unknown to the judge.<sup>29</sup> By the time of Blackstone, in the mid-eighteenth century, judges instructed jurors who had personal knowledge about the disputed events to reveal it so that the jurors could testify about them publicly.<sup>30</sup> However, jurors could also legitimately rely on knowledge that they possessed by virtue of residing in the vicinage<sup>31</sup> even if they did not testify.<sup>32</sup> Courts viewed this information gained out-

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27. See, e.g., GREEN, *supra* note 25, at 108-09 (regarding criminal juries); Mitnick, *supra* note 26, at 204-05 (regarding civil juries).

28. 124 Eng. Rep. 1006 (C.P. 1670).

29. See *id.* at 1012-13.

Chief Justice Vaughan has been criticized for exaggerating the extent to which juries at that time were self-informed. At one point he stated, "the better and greater part of the evidence may be wholly unknown to [the judge]; and this may happen in most cases . . . ." *Id.* at 1013. This assertion surely went too far. While juries at that time might have included members who knew something about the reputation of one of the parties in many cases, and some information more directly relevant to the dispute in a few cases, most jurors obtained the vast majority of their information through the trial process. See, e.g., GREEN, *supra* note 25, at 245 ("Some of Vaughan's arguments based on the self-informing role of the jury ring false, for they hark back to much earlier times . . . ."); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 298-99 n.105 (1978) [hereinafter Langbein, *Criminal Trial*] (characterizing as pretense the notion that juries in the mid-seventeenth century were self-informed to the extent asserted by Vaughan).

30. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375 (1966) (noting that "the practice . . . now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.").

The question of the extent to which the fact finder legitimately relies upon background knowledge is not a new one. The issue was of concern to Roman thinkers. See Fraher, *supra* note 22, at 336-37 and authorities cited therein (discussing the roots of background knowledge in Roman law).

31. See Mitnick, *supra* note 26, at 234 ("[I]t was exclusively the consideration of specific knowledge, not the general variety, that the transformation outlawed . . .").

A study associated with the Chicago Jury Project revealed that juror background knowledge is often decisive in both civil and criminal cases even in the modern era. See Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99 (1966) (describing jurors' use of information about their neighborhood and from their personal backgrounds in a study of 23 consecutive trials).

32. See, e.g., DAWSON, *supra* note 26, at 127 ("For a full 500 years from its organization in the thirteenth century the trial jury of the common law courts retained its mixture of elements.").

side of the trial process as evidence. Indeed, Blackstone described two kinds of evidence: "that which is given in proof, or that which the jury may receive by their own private knowledge."<sup>33</sup>

The conception of legal evidence as encompassing only a portion of the information relied upon by jurors, and in particular, only the portion of the information that came to them in the courtroom, began to emerge in the 1700s.<sup>34</sup> A law of evidence developed<sup>35</sup> as lawyers, representing parties with some regularity,<sup>36</sup> continually urged judges to limit the information that jurors could receive at the trial.<sup>37</sup> This new law of evidence focused largely on rules of admission rather than on the nature of proof or persuasion.<sup>38</sup> Moreover, courts began granting new trials, at least in civil cases, when the courts viewed the jury's verdict as erroneous.<sup>39</sup> Jurors were still allowed to employ their personal knowledge in deciding cases,<sup>40</sup> but judges' decisions to grant new trials were based

33. BLACKSTONE, *supra* note 30, at 368. However, Blackstone noted that the term, "evidence," was commonly used to refer to only some portion of the new information produced at the trial. *See id.* This suggests that there was some confusion about how to understand the notion of evidence even in the eighteenth century.

34. *See* LORD CHIEF BARON GILBERT, *THE LAW OF EVIDENCE* (1754).

35. *See, e.g.,* GREEN, *supra* note 25, at 267 (noting "the development of a true law of evidence in the late eighteenth and early nineteenth centuries"); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 133 (1983) [hereinafter Langbein, *Ryder Sources*] (contending that rules of evidence began to emerge in the middle of the eighteenth century).

36. However, in the criminal context the appearance of prosecution and defense counsel in trials "cannot be called regular until the second half of the eighteenth century." Langbein, *Criminal Trial*, *supra* note 29, at 263.

37. *See, e.g.,* J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, 362-63 (1986); W. BEST, *A TREATISE ON THE PRINCIPLES OF EVIDENCE* 133 (1849).

38. *See* THAYER, *supra* note 6, at 264 ("This excluding function is the characteristic one in our law of evidence."); *see also* Langbein, *Criminal Trial*, *supra* note 29, at 300-06 (discussing the emergence of the law of evidence as rules of exclusion and suggesting the cause as the increased lawyerization of trials rather than simply distrust of juries).

39. *See* Mitnick, *supra* note 26, at 206-08 (discussing *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), and the judiciary's view that obstinate juries were a threat to social order leading to a shift of power from the jury to the judge).

40. *See, e.g.,* THAYER, *supra* note 6, at 170 ("[T]he jury's right to go upon their private knowledge was emphatically recognized in 1670, and continued to be allowed in the books well on into the next century . . ."). By this time, however, jurors often were not familiar with the parties or the dispute and relied on the information filtered through the trial. *See, e.g.,* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314-15 (1973) [hereinafter Langbein, *Origins*] ("Probably in the later fifteenth century, but certainly by the sixteenth, it had become expectable that jurors would be ignorant of the crimes they denounced and determined.").

on what the jury heard in the courtroom.<sup>41</sup> For the first time judges accepted the theory that personal knowledge fell outside the sphere of evidence.<sup>42</sup>

The notion also emerged that evidence encompassed only a fraction of trial information—primarily the exhibits introduced and the assertions contained in the testimony of witnesses.<sup>43</sup> As

41. See THAYER, *supra* note 6, at 170. Thayer states:

[T]he enlarged practice of granting new trials, and the growth and development of it in the seventeenth and eighteenth centuries, was steadily transforming the old jury into the modern one; and at last it was possible for the judges to lay it down for law that a jury cannot give a verdict upon their private knowledge.

*Id.*

42. The comments of the earliest English treatise on evidence continued to reflect the view that personal knowledge was evidence:

The Evidence which the Jury have of the Fact is,

1. Being return'd of the Vicinage, whence the Cause of Action ariseth, the Law supposeth them thence to have sufficient Knowledge to try the Matter in Issue (and so they must) tho' no Evidence were given on either Side in Court; but to this Evidence the Judge is a Stranger.

2. They may have Evidence from their own Personal Knowledge, by which they may be assured, and sometimes are, that what is deposed in Court is absolutely false; but to this the Judge is a Stranger, and he knoweth no more of the Fact than he hath learned in Court, and perhaps by false Depositions; and consequently knows nothing.

3. The Jury may know the Witnesses to be stigmatized and infamous; which may be unknown to the Parties, and consequently to the Court.

4. In many Cases the Jury are to have View necessarily in many by Consent, for their better Information; to this Evidence likewise the Judge is a Stranger.

WILLIAM NELSON, *THE LAW OF EVIDENCE* 2 (1717) (quoting *Bushell's Case*, 124 Eng. Rep. at 1012). This early treatise, although written anonymously, has been attributed to William Nelson. See BEATTIE, *supra* note 37, at 363 & n.120.

Modifications were made in this discussion, however, in a subsequent edition of the Nelson work. In an article on judicial notice, Professor Thayer quoted the second edition:

For centuries the jury used freely their private knowledge; it was their duty to do so. They did, indeed, exercise a judicial function, but they were not restrained by the doctrine of judicial notice. The change in their character was a very gradual one. We may still read in the second edition, published in 1735, of the anonymous "Law of Evidence," the doctrine about the jury which was stated in *Bushell's case*: "The law supposeth them to have knowledge of and capacity to try the Matter in Issue (and so they must), though no Evidence were given on either side in court; but to this the Judge is a Stranger; *i.e.*, he cannot Judge without Evidence, though the Jury may."

James B. Thayer, *Judicial Notice and the Law of Evidence*, 3 HARV. L. REV. 285, 300 (1890) [hereinafter Thayer, *Judicial Notice*] (footnotes omitted) (quoting WILLIAM NELSON, *THE LAW OF EVIDENCE* (2d ed. 1735)).

43. This view emerges, for example, in Gilbert's early treatise on the law of evidence. See GILBERT, *supra* note 34. In that work Gilbert focuses on testimony and written documents as the sources of evidence. See *id.* at 4-5 (describing as sources of evidence two sorts of testimony, "unwritten testimony" and "written evidence," and

early as 1790 James Wilson, one of the original Supreme Court Justices and arguably "the most learned and profound legal scholar of his generation,"<sup>44</sup> noted the tendency among early evidence commentators<sup>45</sup> to view legal evidence as limited to testimony and documents.<sup>46</sup> Wilson rejected this cramped view, noting that fact finders legitimately relied on the statements of counsel, among other sources:

It is generally supposed—and, indeed, our law books, so far as I recollect, go upon the supposition—that the evidence, which influences a court and jury, depends altogether upon what is said by the witnesses, or read from the papers. This, however, is very far from being the case. Much depends on the pleadings of the counsel. His pleadings depend much on a masterly knowledge and management of the principles of evidence. Evidence is the foundation of conviction: conviction is the foundation of persuasion: to convey persuasion is the end of pleading. From the principles of evidence, therefore, must be drawn that train and tenour of reasoning, which will accomplish the aim of the pleader, and produce the perfection of his art.<sup>47</sup>

Indeed, Wilson thought evidence was better understood in relation to various mental processes of the fact finder rather than to tangi-

discussing the preferred kinds of proof from among subclasses of these two categories).

44. Robert Green McCloskey, *Introduction* to THE WORKS OF JAMES WILSON 2 (Robert Green McCloskey ed., 1967). Wilson was also a professor of law at the College of Philadelphia. See *id.* at 2, 37; see also BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 27 (1991) (noting Wilson's position at the school). For a biography of Wilson's life, see CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER (1956).

45. The earliest treatises on evidence included NELSON, *supra* note 42, and GILBERT, *supra* note 34. Nelson's treatise, written anonymously, was first published in 1717. See Thayer, *Judicial Notice*, *supra* note 42, at 300 & n.4. Although Gilbert's treatise was not published until the middle of the century, the work was prepared before Gilbert's death in 1726. See SHAPIRO, *supra* note 44, at 269 n.96. Another notable eighteenth century work in the field was John Morgan's *Essays upon the Law of Evidence*, which appeared in 1789. See SHAPIRO, *supra* note 44, at 27. For a discussion of the early treatises on evidence, see BEATTIE, *supra* note 37, at 363 n.120.

46. See James Wilson, *Of the Nature and Philosophy of Evidence*, in THE WORKS OF JAMES WILSON 369, 398 (Robert Green McCloskey ed., 1967). It appears that Wilson viewed Gilbert's early treatise, see GILBERT, *supra* note 34, as chief among the works conveying this view. Wilson referred to Gilbert's treatise several times in his essay, see Wilson, *supra*, at 374, 382, 395, and Gilbert's work clearly conveyed the view opposed by Wilson. See *supra* note 34 and accompanying text.

47. Wilson, *supra* note 46, at 398.

ble objects or statements of testifying witnesses.<sup>48</sup> He traced these mental processes to fourteen sources.<sup>49</sup> Many of them related to the fact finder's independent knowledge.<sup>50</sup> Wilson asserted "[t]he powers and the operations of the human mind are the native and original fountains of evidence,"<sup>51</sup> not testimony and documents.

Despite Wilson's admonition, commentators continued to conceive of evidence as less than all of the input influencing jurors. During the late eighteenth and early nineteenth centuries, it was typical for "discussion[s] of legal evidence to include or refer to treatises on logic . . . and modes of proof,"<sup>52</sup> implying that fact finding involved more information than the inert material provided by testimony and exhibits. Nonetheless, treatises frequently portrayed evidence as coming only from certain identifiable sources in the trial record. For example, in his influential 1816 treatise, S.M. Phillipps discussed only two sources of evidence—the assertions of sworn witnesses and documents introduced in court.<sup>53</sup> Others also adopted this two-sources view, most notably Sir James Fitzjames Stephen in his famous effort to codify the English law of evidence.<sup>54</sup>

Consistent with this view, Thomas Starkie, another influential scholar writing in the early 1800s, distinguished between testimony and exhibits on the one hand and comments by trial judges and lawyers about those items on the other.<sup>55</sup> He defined evidence as encompassing only the former: "[t]hat which is legally offered by the litigant parties to induce a jury to decide for or against the

48. *See id.* at 374, 398.

49. *See id.* at 374-75.

50. *See id.* at 374-98 (discussing each of the 14 sources of the mental processes).

51. *Id.* at 398.

52. SHAPIRO, *supra* note 44, at 30.

53. *See* S.M. PHILLIPPS, *THE LAW OF EVIDENCE* (1816). Phillipps's assumptions about the limits of legal evidence were revealed in the first two paragraphs of the work, which declared that the first part of the treatise concerned witness testimony and the concluding part related to written evidence. *See id.* at 1-2. At no point did Phillipps suggest that evidence might also come, for example, from the prior knowledge of the fact finders or from the arguments of counsel.

54. *See* SIR JAMES FITZJAMES STEPHEN, *A DIGEST OF THE LAW OF EVIDENCE* (5th ed. 1901). Writing in the 1870s, Stephen defined "evidence" as: "(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) Documents produced for the inspection of the court or judge; such documents are called documentary evidence." *Id.* at 4.

55. *See* 1 THOMAS STARKIE, *A PRACTICAL TREATISE OF THE LAW OF EVIDENCE* (7th ed. 1842) [hereinafter STARKIE, *TREATISE*]. The first edition of Starkie's treatise was published in 1824. *See* MUELLER & KIRKPATRICK, *supra* note 4, at 527 (citing T. STARKIE, *EVIDENCE* (1824)).

party alleging such facts, as contradistinguished from all comment and argument on the subject, fall within the description of *evidence*.”<sup>56</sup> Comment and argument aided fact finders in their judgment. Starkie noted, however, that this information was merely “*probatio artificialis*” in Roman law,<sup>57</sup> and he did not view it as evidence.

This Anglo-American view of evidence, excluding comments by attorneys and judges and the jurors’ background knowledge, bears close relation to an important philosophical tradition—“English empiricism, as exemplified by Locke, Bentham and . . . Mill.”<sup>58</sup> Professor Barbara Shapiro has documented the role of this epistemological view in the development of our law of evidence.<sup>59</sup> English empiricists posited that there exists a “world of fact” that is “independent of our beliefs about it.”<sup>60</sup> While the law usually cannot achieve certainty about past events, one can judge reconstructions according to levels of probability.<sup>61</sup> Inferences about ultimate facts from known facts were also possible based on “a straightforward application of ordinary common sense or practical reasoning.”<sup>62</sup> Empiricists believe that societal members can draw these inferences based on “a universal cognitive competence”<sup>63</sup>—“a shared stock of knowledge,” as William Twining described it.<sup>64</sup> On this assumption, little reason existed to focus on the reasoning process and the underlying knowledge involved. This reasoning process should not change significantly from one observer to another.<sup>65</sup>

56. STARKIE, *TREATISE*, *supra* note 55, at 8-9.

57. *See id.* at 422. Starkie’s comments also indicate that attorney comment was much more confined at that point in English history than in present-day practice in this country. *See id.* at 422-24.

58. William Twining, *Evidence and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 62, 70 (William Twining ed., 1986).

59. *See* Barbara J. Shapiro, “To A Moral Certainty”: *Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 *HASTINGS L.J.* 153 (1986) (discussing the relationship between a jury’s evaluation of evidence and the developments of epistemology in England).

60. Twining, *supra* note 58, at 70.

61. *See* Shapiro, *supra* note 59, at 176-77.

62. Twining, *supra* note 58, at 70.

63. *See* L. Jonathan Cohen, *Freedom of Proof*, in *FACTS IN LAW* 1, 2 (William Twining ed., 1983).

64. Twining, *supra* note 58, at 70.

65. Eighteenth and nineteenth century commentators on evidence did not speak uniformly on this point. Jeremy Bentham implied, in his philosophical work on evidence, that evidence includes the preexisting knowledge of the fact finder. *See* JEREMY BENTHAM, *A TREATISE ON JUDICIAL EVIDENCE* 12-13 (1825) (discussing circumstantial

This theoretical perspective drawn from English empiricism<sup>66</sup> survived through the great writers dominating the field of legal evidence during the late nineteenth and early twentieth centuries.<sup>67</sup> For example, Professor Thayer viewed evidence as no more than that input embodied by the four-sources conception.<sup>68</sup> Signifi-

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evidence and real evidence as that deduced, presumably by the juror). For example, Bentham asserts that "[t]he argument drawn from the impossibility or improbability of an alleged fact . . . comes to be that of counter-testimony, and, at bottom, is nothing more than circumstantial evidence." *Id.* at 276. In his more explicit attempts to define evidence, Bentham also arguably included preexisting knowledge of fact finders within the notion of "real evidence." *See id.* at 12. His discussion of circumstantial evidence, however, suggests that such preexisting knowledge was limited to matters nearly uniformly and immediately comprehended by all fact finders. *See id.* at 144. Some knowledge surely is of this sort. However, one treatise noted that the fund of shared information did not cover all the preexisting knowledge that jurors employ to decide cases. *See, e.g.,* 1 *BEST ON THE PRINCIPLES OF THE LAW OF EVIDENCE* (James A. Morgan ed., 1882). It was stated:

As the knowledge, observation, and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ; and we continually find that, not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable, another holds to be physically impossible.

*Id.* at 10.

66. *See* 1 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 3 n.2 (Peter Tillers ed., 1983) (editorial note indicating that Wigmore's theoretical approach was drawn from English empiricism).

67. Who were the early giants of evidence scholarship in this country? Professors Charles Wright and Kenneth Graham convey their views in the following excerpt from their treatise:

Though Judge Swift of Connecticut had written the first American book on evidence as early as 1810 it does not appear to have had any considerable influence. The first important treatise written in this country was published by Simon Greenleaf in 1842. Written for his classes at the Harvard Law School, it was to become the authoritative statement of the law for the rest of the 19th Century, going through some 16 editions by 1899. Greenleaf's treatise marked not only the beginning of American evidence scholarship but also began the domination of that scholarship by the Harvard School of writers—Thayer, Wigmore, and Morgan, to name only the giants.

21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* 20 (1977) (footnotes omitted).

68. *See* James B. Thayer, *Presumptions and the Law of Evidence*, 3 *HARV. L. REV.* 141, 143 (1889) [hereinafter Thayer, *Presumptions*]. Writing in the 1880s, Professor Thayer defined evidence as "any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact." *Id.* This definition appeared potentially broader than the four-sources conception. However, Thayer's treatise on evidence published only a few years later implied that he saw evidence as no broader than the four-sources view. For example, while Thayer asserted that Stephen's view of evidence—encompassing only testimony and documents—was clearly erroneous, his counter was only that Stephen's definition failed to account for what Bentham had called "real evidence." *See* THAYER, *supra* note 6, at 263 n.1. Indeed, Thayer only clearly indicated in his treatise that evidence in



cantly, Thayer advanced an expansive theory of judicial notice that rationalized the use of preexisting knowledge by jurors.<sup>69</sup> This view is much broader than the prevailing idea of judicial notice as a formal statement by a judge regarding the existence of particular facts.<sup>70</sup> Still, Thayer did not view this preexisting knowledge held by jurors as evidence.<sup>71</sup> He also did not view attorney argument as

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a jury trial came from two general sources: visible objects presented to the tribunal and oral or written testimony of sworn witnesses. *See id.* at 263 (describing as examples of evidence "a visible object" or "testimony, oral or written" presented to the tribunal as a ground for inference). He did not clearly indicate that judicially noticed facts were evidence. *See id.* at 277-312 (discussing judicial notice). Indeed, his expansive view of judicial notice implied that much of what he thought was properly noticed was not evidence. *See infra* notes 70-71 and accompanying text. He also did not discuss formal stipulations between litigants as evidence. Further, Thayer explicitly excluded from the category of evidence the preexisting knowledge of fact finders and the information conveyed in the arguments of the lawyers. This point is evident in Thayer's discussion of what constitutes evidence:

But when one offers "evidence," in the sense of the word which is now under consideration, he offers, otherwise than by reference to what is already known, to prove a matter of fact which is to be used as a basis of inference to another matter of fact. He offers, perhaps, to present to the senses of the tribunal a visible object which may furnish a ground of inference; or he offers testimony, oral or written, to prove a fact . . . In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element thus added is what we call the evidence.

THAYER, *supra* note 6, at 263-64 (footnote omitted); *see also id.* at 270-71 (contending that the reasoning process, which builds upon the "great body of facts and ideas" that a fact finder already possesses at the beginning of an inquiry, "does not belong to the region of the law of evidence").

69. Thayer saw a trial judge as capable of noticing a broad range of preexisting knowledge, *see for example*, THAYER, *supra* note 6, at 301-06, and asserted that even a jury could rely upon such information whether or not it had been formally noticed by the trial court. *See id.* at 296 ("But as the jury is bound to keep within the restrictions imposed upon courts by the principle of judicial notice, so also it has the liberty which that principle allows to courts.").

70. *See, e.g.*, FED. R. EVID. 201(g). This provision contemplates that the trial judge will formally instruct the jury regarding any fact to be judicially noticed.

71. In his pioneering discussion of judicial notice, Thayer did not clarify what, if any, part of the category of judicially noticed facts, as he understood that category, amounted to evidence and what part amounted to nonevidence. However, the breadth of the category of judicially noticed facts, as Thayer described it, strongly suggests that he did not consider all judicially noticed facts as constituting evidence. At least some of those facts overlapped with the "great body of facts and ideas" that fact finders brought with them to the proceeding and employed in the reasoning process. *See* THAYER, *supra* note 6, at 270-71. Thayer explicitly stated that this preexisting knowledge was not evidence. *See id.* at 263-64. The Advisory Committee's note to Rule 201 of the Federal Rules of Evidence also concluded that Thayer did not view this information as evidence but rather as "non-evidence facts." *See* FED. R. EVID. 201 advisory committee's note.

evidence.<sup>72</sup>

Professor Thayer recognized that this view of legal evidence did not accord with our conception of evidence from normal parlance. He openly acknowledged that much information upon which jurors rely to find facts did not qualify as legal evidence.<sup>73</sup> He also acknowledged the import of this conclusion: "It must be noticed, then, that 'evidence,' in the sense used when we speak of the law of evidence, has not the large meaning imputed to it in ordinary discourse."<sup>74</sup>

Professor Wigmore, Thayer's student, was of the same view. At the outset of his treatise, Wigmore did not offer a tight definition of legal evidence, contending that such an effort was "of little practical consequence."<sup>75</sup> For Wigmore the process of presenting "elemental facts" differed from "the process of piecing together."<sup>76</sup> He saw only the former as involving evidence; the latter fell within the distinguishable ambit of argument.<sup>77</sup> Likewise, in his discussion of judicial notice, Wigmore conceded the need for a jury to rely on its preexisting knowledge. But he asserted that a jury's authority is closely confined to the reasoning process, and he implied, consistent with Thayer's view, that such knowledge is not evidence.<sup>78</sup> Thus, like Thayer, Wigmore believed that evidence did not encompass all of the operational input that legitimately influences the fact finder.<sup>79</sup>

72. See THAYER, *supra* note 6, at 264.

73. See *id.* at 270 (acknowledging that the jurors brought to the trial and relied upon "a great body of facts and ideas . . . of which no particle of 'evidence,' strictly so called, is ever formally presented in court."). Thayer also acknowledged the importance of the fact finder's function in the argumentation process. See *id.* at 271. However, he saw it as mere "reasoning" from what was already known and, therefore, not evidence. See *id.* at 264 ("In giving evidence we are furnishing to a tribunal a new basis for reasoning.").

74. *Id.* at 264.

75. WIGMORE, *supra* note 66, at 7. In the editorial notes to the most recent edition, however, Professor Tillers contends that Wigmore failed to acknowledge the importance of how we define evidence. See *id.* at 7 n.4.

76. *Id.* at 6-7.

77. See *id.* at 7.

78. See 9 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 726-31 (James H. Chadbourn ed., 1983).

79. Wigmore most assuredly believed lawyers should study the reasoning process essential to infer facts from what he called the "elemental facts" established by the juridical evidence. See WIGMORE, *supra* note 66, at 6-7. He published a book for law students on this topic. See JOHN HENRY WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* (2d ed. 1913) [hereinafter *THE PRINCIPLES*].

Interestingly, Wigmore conceded that the topic of this book was properly un-

Since Thayer's time this restrictive view has continued to strongly influence legal thinking about evidence. The Advisory Committee that drafted the Federal Rules of Evidence, for example, accepted this conception in its comments concerning judicial notice.<sup>80</sup> The Committee conceded that "every case involves the use of hundreds or thousands of non-evidence facts."<sup>81</sup> It also stated that these "non-evidence" facts, unlike "judicative facts,"<sup>82</sup> "could not possibly be introduced into evidence."<sup>83</sup> The Committee did not closely define the proper limits of "non-evidence facts" or how to distinguish them from "judicative facts."<sup>84</sup> Nonetheless, the Committee made clear that evidence does not include much information upon which jurors legitimately rely to find facts.<sup>85</sup>

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derstood as a "study of the principles of Evidence." *Id.* at 1. As already noted, his treatise indicated that he did not believe the reasoning process itself involved the use of "evidence." See *supra* text accompanying notes 75-79. The explanation for this apparent contradiction appears to be that in his book on judicial proof Wigmore was speaking of evidence, not in a formal legal sense as he had in his treatise, but more in accordance with how we use that term in general parlance. This dual usage of the term by Wigmore did not reflect the same muddling of ideas that prompted this Article. This Article focuses on the tendency of lawyers to think of evidence in accordance with the four-sources view and their tendency, as well, to think evidence covers everything that legitimately influences the fact finder. This process involves a combining of the two conceptions. The context of Wigmore's discussion at least gave some indication that he simply moved from one conception of evidence to another rather than intermingling the two conceptions.

80. The federal rules do not include a definition of evidence. See FED. R. EVID.

81. FED. R. EVID. 201(a) advisory committee's notes (citing Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, PERSPECTIVES OF LAW 69, 73 (1964)).

82. *Id.* The Committee borrowed the term "judicative facts" from Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942), but "seems to have altered the meaning of the term slightly." Fraher, *supra* note 22, at 333 n.5.

83. FED. R. EVID. 201(a) advisory committee's note.

84. The Advisory Committee defined "judicative facts" as those "which relate to the parties," consistent with a definition provided by Professor Davis. *Id.* (citing Davis, *supra* note 82, at 404-07). This definition, however, was offered by Professor Davis to distinguish "judicative facts" from "legislative facts." *Id.* (citing Davis, *supra* note 82, at 404-07). It was of no help in separating "judicative facts" from "non-evidence facts." *Id.*

85. Like Thayer, the Advisory Committee may have assumed that this use of non-evidentiary facts arose primarily in the reasoning process and that it was largely the same among all persons. See *supra* note 71 and accompanying text. The Advisory Committee quoted Thayer's assertion that "not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgement and efficiency, is imputed to judges and juries as part of their necessary mental outfit." FED. R. EVID. 201(a) advisory committee's notes (quoting THAYER, *supra* note 6, at 279-80).

The most obvious manifestation of the four-sources conception of legal evidence appears in the pattern instructions employed in jury trials across the country. The following instruction, promulgated by the District Judges Association of the United States Sixth Circuit, exemplifies the approach typically followed:

1.04 Evidence Defined

- (1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.
- (2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; the stipulations that the lawyers agreed to; and the facts that I have judicially noticed.
- (3) Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.
- (4) [Material that was ruled inadmissible or that was stricken from the record is also not evidence and should not be considered.]
- (5) Make your decision based only on the evidence, as I have defined it here, and nothing else.<sup>86</sup>

The Sixth Circuit instructions also tell the jurors, in seeming contradiction to instruction 1.04, that they may consider additional factors such as their "common sense," "everyday experience with people and events,"<sup>87</sup> and circumstantial evidence.<sup>88</sup> Yet, there is no suggestion that these additional sources of information also constitute evidence. Some courts also explicitly tell jurors that they may consider certain other sources of nonevidentiary information such as opening statements by counsel.<sup>89</sup> These instruc-

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86. *Sixth Circuit Pattern Criminal Jury Instructions*, in *MODERN FEDERAL JURY INSTRUCTIONS* 6-17 (1991).

87. *Id.* at 6-18 (Rule 1.05).

88. *See id.* at 6-20 (Rule 1.06).

89. In the Ninth Circuit, for example, jurors are told explicitly that while opening statements and summations are not evidence, the jury should consider them. *See, e.g.,*

tions reflect the prevailing notion that evidence does not encompass all of the input that appropriately influences the trier's factual judgments.<sup>90</sup>

Reviewing courts also promulgate this view of evidence. Many judicial opinions hold that the fact finder can appropriately consider certain information that is not evidence. Courts have reached this conclusion regarding a variety of information falling outside the four-sources conception, including the demeanor of parties in the courtroom while not testifying,<sup>91</sup> information gained

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*Ninth Circuit Pattern Criminal Jury Instructions*, in MODERN FEDERAL JURY INSTRUCTIONS 9-18 (1991) (Instruction 3.05(1)) ("Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence."). In the federal trial courts in the Sixth Circuit, jurors are told merely that the judge's statements about the law should control over any statements made by the lawyers, suggesting that jurors may, in general, consider the lawyers' statements. See *Sixth Circuit Pattern Criminal Jury Instructions*, *supra* note 86, at 6-2 (Instruction 1.02(3)). In other federal circuits, however, jurors are frequently told that the opening statements and closing arguments are not evidence. See, e.g., *Eighth Circuit Pattern Criminal Jury Instructions*, in MODERN FEDERAL JURY INSTRUCTIONS 8-4 (1991) (Instruction 1.03(1)) ("Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.").

90. This four-sources view of evidence, or a view that evidence comes from even fewer than four sources, pervades the pattern instructions used in federal trial courts in other circuits. See, e.g., *Seventh Circuit Pattern Criminal Jury Instructions*, in MODERN FEDERAL JURY INSTRUCTIONS 7-3 (1991) (Instruction 1.07) ("The evidence consists of the sworn testimony of the witnesses, the exhibits received in evidence, and stipulated, admitted, or judicially noticed facts. . . . You are to consider only the evidence received in this case."); *Eighth Circuit Pattern Criminal Jury Instructions*, *supra* note 89, at 8-4 (Instruction 1.03) ("['Evidence' includes the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated—that is, formally agreed to by the parties, and any facts that have been judicially noticed—that is, facts which I say you may, but are not required to, accept as true, even without evidence."); *Ninth Circuit Pattern Criminal Jury Instructions*, *supra* note 89, at 9-1 (Instruction 1.01) ("It will be your duty to decide from the evidence what the facts are. . . . The evidence will consist of the testimony of witnesses, documents, and other things received into evidence as exhibits and any facts on which the lawyers agree or which I may instruct you to accept."); *Eleventh Circuit Pattern Criminal Jury Instructions*, in MODERN FEDERAL JURY INSTRUCTIONS 11-3 to 11-4 (1991) (Instruction 4.1) ("As stated earlier you must consider only the evidence that I have admitted in the case. The term 'evidence' includes the testimony of the witnesses and the exhibits admitted in the record.").

91. See, e.g., *United States v. Schipani*, 293 F. Supp. 156, 163 (E.D.N.Y. 1968), *aff'd* 414 F.2d 1262 (2d Cir. 1969) (where, in bench trial, court considered demeanor of non-testifying defendant, court later stated that it had found defendant's guilt "on the record," but that "[c]onfirmation came from observation of the defendant in court"); *Henriod v. Henriod*, 89 P.2d 222, 224-25 (Wash. 1938) (affirming, despite trial court's reliance in part on demeanor of party while not testifying because, without characterizing the information as "evidence," court concluded that trier was entitled to take note of party's demeanor throughout the proceeding). Some commentators have described

from a jury view,<sup>92</sup> information conveyed in closing arguments,<sup>93</sup> and information jurors possess as part of their background knowledge.<sup>94</sup>

This view also dominates the way that we teach law students to think of evidence. Coursebooks on evidence usually imply by their coverage or explicitly state that evidence comes only from witness testimony and trial exhibits.<sup>95</sup> The coursebooks may also cover judicial notice and stipulations as additional methods of establishing some incidental facts, but they do not uniformly agree that these are sources of evidence.<sup>96</sup> This approach both reflects

this information, however, as a form of real evidence. See, e.g., Jerome Michael & Mortimer J. Adler, *Real Proof: I*, 5 VAND. L. REV. 344, 365 (1952).

92. See, e.g., *Burns v. Janes*, 398 A.2d 1125, 1129 (R.I. 1979) (jury view does not provide evidence); *Brookhaven Supply Co. v. DeKalb County*, 216 S.E.2d 694, 696 (Ga. Ct. App. 1975) (noting the jury's view is not evidence); see also Imwinkelried, *supra* note 15, at 191 (noting that while not held universally, "the prevailing view is that a jury view is not evidence"). Commentators have typically favored the position that a view provides a form of real evidence. Some have concluded that this is the modern majority position of the courts. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 1196 & n.15 (1995).

93. See, e.g., *Kuehl v. Hamilton*, 297 P. 1043, 1044-45 (Or. 1931) (affirming trial court's conclusion that remark in counsel's summation relating personal experience of counsel was "not evidence," but was, nonetheless, properly offered by counsel and properly considered by the jury); see also WIGMORE, *supra* note 66, at 6 n.3 and authorities cited therein ("Innumerable decisions make the distinction between argument and evidence.").

94. See, e.g., *Jenney Elec. Co. v. Branham*, 41 N.E. 448, 451 (Ind. 1895) (stating that jurors' "extensive experiences" and "education" should not be "laid aside in passing upon the inducements which may surround a witness to speak falsely," but not declaring such information to be "evidence"); *Rostad v. Portland Ry., Light & Power Co.*, 201 P. 184, 186, 188 (Or. 1921) (rejecting claim that trial court erred in instructing jurors to consider their "experience as men of affairs" because, in analyzing "the evidence," fact finders cannot "be divested of general knowledge of practical affairs"); *Tennessee Gas Transmission Co. v. Hall*, 277 S.W.2d 733, 735-37 (Tex. Civ. App. 1955) (holding that jurors were entitled to consider their common knowledge that certain forms of plowing would reach a certain depth and potentially damage buried gas pipeline though court did not call such knowledge "evidence").

95. For a sample of modern evidence coursebooks, see for example, RONALD L. CARLSON ET AL., *EVIDENCE IN THE NINETIES* (3d ed. 1991); RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* (1977); MUELLER & KIRKPATRICK, *supra* note 4; JON R. WALTZ & ROGER C. PARK, *CASES AND MATERIALS ON EVIDENCE* (8th ed. 1995); WEINSTEIN ET AL., *supra* note 4.

96. The coursebooks typically do not treat other information as evidence. They never suggest, for example, that the opening statements, the questions, or the summations of counsel should be understood as evidence. The materials raising problems of logical relevance surely will hint to the observant student that jurors, like judges ruling on admissibility, must employ a fund of preexisting knowledge in drawing inferences. Yet, there also is no indication in the coursebooks that this knowledge should be viewed as evidence. Typically, if they cover demeanor of witnesses or of nontestifying

and reinforces the dominant view held within the profession.

Modern treatises on the subject also reflect this restrictive conception of legal evidence.<sup>97</sup> The treatises do not explicitly define evidence in accordance with this restrictive conception, but they typically imply by their focus, as well as by specific statements, that evidence is primarily testimony and exhibits.<sup>98</sup> Indeed, they suggest a two-sources conception because they do not typically include judicial notice instructions or stipulations.

Judicial opinions, classroom instruction, and modern treatises show that lawyers today generally understand legal evidence as emanating from only a few, specific sources. This conclusion does not necessarily mean that lawyers generally equate the limits of evidence with the limits of legitimate proof. As we have already noted, there is general recognition that information outside the four-sources can legitimately influence a fact finder's decision.<sup>99</sup> However, lawyers do tend to confuse the boundaries of the four-sources conception of evidence with the boundaries of legitimate proof. Part IV focuses on this problem.

#### IV. INTERFERENCE FROM THE BROADER CONCEPTION OF EVIDENCE

Although lawyers generally embrace the four-sources conception of legal evidence, they sometimes adopt the alternative view that legal evidence encompasses all that the fact finder legitimately considers.<sup>100</sup> A problem arises, however, because lawyers tend to

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parties, the coursebooks do not suggest that this information might appropriately be understood as evidence. For an exception on this score, however, see WEINSTEIN ET AL., *supra* note 4, at 115-30. The one general exception to the restrictive conception, which the coursebooks typically have noted, concerns the disagreement that has arisen in the courts over whether jury views are sources of evidence.

97. A sample of leading hornbooks include GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE (1978); MUELLER & KIRKPATRICK, *supra* note 92; JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE (4th ed. 1992).

98. For an example of a particular statement suggesting this restrictive view of what constitutes evidence, consider the following:

When attorneys contemplate litigation, their evaluation of prospective evidential materials departs sharply from that of other professionals or lay persons: lawyers must anticipate the impact the rules of evidence will have upon the *admissibility* of these materials should a judicial trial be necessary. At trial, the rules of evidence may operate to exclude all or part of the *proffered testimony or tangible items*; evidence so rejected will not be considered in the decisional process of the tribunal.

LILLY, *supra* note 97, at 2-3 (second emphasis added).

99. See *supra* notes 7-22 and accompanying text.

100. See, e.g., authorities cited *supra* note 6.

confuse the two ideas rather than recognize them as competing conceptions. We sometimes end up defining evidence according to the four-sources conception while *simultaneously* concluding that evidence constitutes everything that legitimately influences the fact finder.<sup>101</sup> This confusion frequently occurs by implication in law school teaching, misleading students about the nature of the fact finding process. Through our almost singular focus on admissibility questions—and our further concentration on testimony—we imply that evidence covers only a few things *and that these are the only components worth discussing that are involved in producing factual conclusions*. Of course, relevance problems, which coursebooks typically provide in abundance, can expose students to the need, not only for the judge but also for the fact finder, to rely on information external to the testimony and exhibits to reach factual determinations.<sup>102</sup> However, questions of relevance do not fully explore issues of proof since the threshold questions of relevance involve relatively lax standards.<sup>103</sup> Also, for the instructor to

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101. A tendency to think of legal evidence as encompassing all sources of proof has long coexisted with the dominant, four-sources conception. Courts and scholars commonly assert that legal evidence includes “all the means by which any . . . fact [in dispute at a judicial trial] is established or disproved.” Lyman Ray Patterson, *Evidence: A Functional Meaning*, 18 VAND. L. REV. 875, 876 (1965) (quoting *In re Everts*, 121 N.W.2d 487, 490 (Neb. 1963)); see also 22 C.J. *Evidence* § 1 (1920) (“[T]he term ‘evidence’ includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.”). However, while this broad definition may accord with the meaning of evidence in ordinary language, the commentators who have espoused it have failed to note that the dominant conception of legal evidence is actually more restrictive. Cf. Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 87 NW. U. L. REV. 604, 616-17 (1994) (noting the conventional view of legal evidence does not help explain how a trier reaches factual judgments because that view does not embody much information that goes into reaching them). By failing to note the dual conception of evidence they embrace, lawyers risk the erroneous inference that anything that is not evidence, as defined by the four-sources conception, is not appropriately considered in deciding the facts in a dispute.

102. For the view of a leading evidence teacher on the incidental tendency of the evidence course to convey information about how triers find facts, see PAUL F. ROTHSTEIN, *EVIDENCE IN A NUTSHELL* 1 (1970) (“You will be asked to master a body of legal prohibitions; but such mastery should yield, as an incidental benefit, some useful insights into how minds come to accept propositions of fact as true.”). However, I do not believe the typical course conveys many of these insights.

103. Rule 401 of the Federal Rules of Evidence defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. Additional rules of relevance appear in Article IV, the most important of which is Rule 403, which provides that even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consid-



explore the complexity of the reasoning processes different jurors might employ, and the extent of the nonevidentiary information involved, would take a substantial block of time typically unavailable in evidence courses.<sup>104</sup> Further, we hardly discuss many of the other important aspects of proper factual persuasion such as the ordering of testimony, the demeanor of the witnesses, and the statements, questions, and arguments of the parties and attorneys. The typical evidence course fails to convey to students either the full complement of influences that operate on fact finders or the process by which fact finders infer facts.

Understanding the rules of testimonial admissibility is only incidental to the larger effort of proof as the story of the *Dixon* trial in Part II underscores. Were it otherwise, all of my colleagues who were attorneys at the Public Defender Service should have had roughly similar success records in trials of roughly similar difficulty since all of the lawyers knew the fundamentals of evidence. The reality, however, was that their success rate in trials was enormously varied. A few attorneys repeatedly gained acquittals in seemingly difficult cases while a few others regularly lost seemingly winnable trials. This was true largely because the process of fact finding is complicated and heavily dependent on input not conventionally characterized as evidence. The typical evidence course teaches little about the overall process. Its narrow focus suggests that facts essentially leap from testimony and exhibits.

The misleading message of the typical evidence class also frequently goes uncorrected by other courses.<sup>105</sup> A few students may gain a sense of the complicated nature of fact finding through clinical or simulation classes. However, these courses typically have small enrollments, and in any event, usually cannot focus heavily on the analytical and psychological dimensions of proof. Law schools have sometimes instituted classes focusing on the

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erations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

104. The complicated nature of the threshold relevance inquiry is often overlooked. For one indication of its complexity, see Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1978) (demonstrating the need, in deciding whether to exclude, to recognize "that part of proving a case may involve meeting a jury's expectations about proof—that is, satisfying the expectations of triers of fact who logically reason that a party whose position is sound should have evidence on particular points").

105. See William Twining, *Taking Facts Seriously*, 34 J. LEGAL EDUC. 22, 40 (1984) ("[R]arely is fact finding as such directly studied in a systematic, comprehensive, and rigorous manner.").

theoretical analysis of the proof process.<sup>106</sup> The most notable, perhaps, was Wigmore's course at Northwestern,<sup>107</sup> which was based on his relatively unheralded book on judicial proof.<sup>108</sup> These scattered attempts have not spread widely.<sup>109</sup> The result is that law schools have largely avoided systematically engaging law students in rigorous analysis of the process of proof.

The conflation of the two conceptions of evidence by legal educators has confused the two conceptions in the minds of students. On reflection, legal educators know that proving facts involves much more than simply amassing the data embodied in testimony and exhibits. Many reasons can be offered for our decision to forego engaging students in more of the critical fact finding issues.<sup>110</sup> One important reason is that we believe we already engage students well on this level, based in part on our tendency to view the four-sources as the primary legitimate basis for factual decisions. Unfortunately, our approach sends students into the legal world with a distorted view of how facts are established in courts.

The tendency to mix the two conceptions of evidence also causes difficulty in resolving actual cases. Courts can easily miscalculate the evidentiary basis for verdicts and the harmfulness of attorney errors through confusing of the two theories. The consequences of this judicial confusion over the definition of evidence can be seen in a variety of contexts.

The muddling can arise when courts focus on whether certain nonevidence, as defined by the four-sources conception, should be considered as supporting a verdict. One instance occurs when re-

106. *See id.* at 28.

107. *See id.* at 27-28 (discussing Wigmore's evidence course at Northwestern).

108. *See* WIGMORE, *THE PRINCIPLES*, *supra* note 79.

109. *See* Twining, *supra* note 105, at 28.

As indicated in the text, I believe that the typical evidence course fails to convey to students either the full extent of legitimate influences on fact finders or to engage students in much analysis of the way that fact finders find facts from the operational input to which they are exposed. Some courses do give students a better perspective though it is difficult to teach both widely and deeply in this area because of the complexity of the proof process. Materials currently exist that are designed to engage students in rigorous analysis of the inferential process. *See, e.g.*, TERENCE ANDERSON & WILLIAM TWINING, *ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF* (1991). Also, materials exist that are designed to serve as a basis for teaching a unified course in evidence and trial advocacy. *See, e.g.*, 1 ROBERT B. BURNS ET AL., *PROBLEMS AND MATERIALS IN EVIDENCE AND TRIAL ADVOCACY* (1994); MICHAEL R. FONTHAM, *TRIAL TECHNIQUE AND EVIDENCE* (1995).

110. *See* Twining, *supra* note 105, at 32-42.

information should be considered in cases where it appears highly important. The Texas Supreme Court's opinion in *Texas & New Orleans R.R. v. Grace*<sup>111</sup> provides an example of this problem. The dispute focused on whether the operators of a train that struck and killed a drunken man had attempted to brake as soon as they noticed him on the tracks.<sup>112</sup> The trial court submitted special issues on the ground of discovered peril on which the jury returned a verdict for the family of the dead man.<sup>113</sup> An intermediate appellate court, relying in part on palpable evasiveness by the train operators in testifying for the defense, rejected the railroad company's contention that there was insufficient evidence to support submission of the special issues.<sup>114</sup> The Texas Supreme Court, however, agreed with the company and set aside the judgment.<sup>115</sup> That court concluded that the questionable credibility of the operators' testimony could not support the plaintiff's claims that the operators had seen the deceased well before braking.<sup>116</sup> The reason given was simply that the witnesses' questionable credibility was not evidence to prove the opposite of their assertions.<sup>117</sup> The court's conclusion as to what constitutes evidence coincided with the four-sources conception of evidence. Yet, the view that information not qualifying as evidence could not support the plaintiff's allegations mistakenly relied on the broader conception of evidence. As a result, the Texas court failed to meaningfully confront why negative credibility information was not proper proof of the plaintiff's contentions.

Similar confusion has emerged as to whether information obtained through a viewing can support a verdict. The Oregon Supreme Court's decision in *Jack v. Hunt*<sup>118</sup> provides an example.

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111. 188 S.W.2d 378 (Tex. 1945).

112. *See id.* at 380-81.

113. *See id.* at 379.

114. *See Texas & New Orleans R.R. v. Grace*, 185 S.W.2d 219, 221-22 (Tex. Civ. App. 1944). The intermediate court also noted that photographs demonstrated that the operators could easily have seen the man long before they claimed to have first noticed him. *See id.* at 221. In addition, that court noted that there was testimony that the emergency equipment had been sounded and that the fireman reportedly had yelled, "Hold it, that will do," which could have been understood as meaning "that the whistling was not going to get the deceased off the track." *Id.* at 222.

115. *See Texas & New Orleans R.R.*, 188 S.W.2d at 381.

116. *See id.* at 380.

117. *See id.* "The fact that the testimony of an interested witness is not accepted as evidence in his favor does not operate to convert it into evidence against him." *Id.*

118. 264 P.2d 461 (Or. 1953), *aff'd on reh'g*, 265 P.2d 251 (Or. 1954).

preme Court's decision in *Jack v. Hunt*<sup>118</sup> provides an example. There, Ms. Jack sold the Hunts a tract of land next to a small tract that Ms. Jack retained and on which she lived in a small house.<sup>119</sup> Several years later the Hunts obstructed what Ms. Jack claimed was an implied easement created upon the severance of the two tracts and leading to the area behind her home.<sup>120</sup> The trial court conducted a view of the area, and ultimately issued an injunction in Ms. Jack's favor, concluding that the alleged easement had been created.<sup>121</sup> However, the Oregon Supreme Court reversed and entered a judgment for the Hunts, declaring that there was "no evidence of a defined roadway leading from the road in question to the rear of the plaintiff's premises."<sup>122</sup> Ms. Jack petitioned for rehearing noting that "the trial court on view of the premises observed a well-defined roadway leading to the rear of the plaintiff's property."<sup>123</sup> The Oregon Supreme Court rejected this contention with a single sentence: "This view of the property by the trial court was not in itself evidence, but was only for the purpose of giving the court a better understanding of the evidence to be offered."<sup>124</sup> Of course, under the four-sources conception, a view is not evidence, but the fact finder can still consider the information obtained as providing proof of a disputed proposition. To say that a view is not evidence and, therefore, should not be considered as tending to prove anything is to muddle the two conceptions of evidence.<sup>125</sup>

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118. 264 P.2d 461 (Or. 1953), *aff'd on reh'g*, 265 P.2d 251 (Or. 1954).

119. *See id.* at 462-63.

120. *See id.* at 463.

121. *See id.*

122. *Id.* at 465.

123. *Jack v. Hunt*, 265 P.2d 251, 251 (Or. 1954).

124. *Id.*

125. I do not mean that the Oregon Supreme Court should necessarily have considered the information purportedly available through the view. The only indication of what the trial judge saw may have been Ms. Jack's statements in the petition for rehearing. In that case, the appellate court might have thought it inappropriate to consider the information *for that reason*. However, there may well have been some better indication in the record that the trial judge had seen the roadway during the view. To say, as a categorical matter, that because the information provided by a view is not evidence it should not be considered is to muddle the two conceptions of evidence.

Some debate has arisen about whether a jury view provides "evidence." *See, e.g.,* MUELLER & KIRKPATRICK, *supra* note 92, at 1196. The debate itself reflects confusion about what we mean by legal evidence. This is because the standard argument for calling a view evidence is that jurors will inevitably use any information obtained from it that they deem relevant as bearing on disputed propositions. The argument assumes that if jurors will consider information as bearing on a disputed proposition, then

The muddling problem also appears when deciding whether a reviewing court should consider nonevidence, as defined by the four-sources conception, in assessing the potential prejudice associated with trial error. The Supreme Court's decision in *Darden v. Wainwright*,<sup>126</sup> a death penalty case, provides an example. One of the issues in *Darden* was whether a prosecutor's inflammatory closing summation violated the defendant's right to due process.<sup>127</sup> The summation included concededly outrageous comments.<sup>128</sup> Yet, *Darden* could only make out the due process violation if the comments rendered the trial fundamentally unfair<sup>129</sup> and, on that score, the relative strength of the government's case was crucial. The Court noted that *Darden* took the stand on his own behalf.<sup>130</sup> Indeed, *Darden* provided an alibi corroborated in part by several of the state's witnesses.<sup>131</sup> Yet, the Court rejected *Darden*'s claim, asserting that the "evidence" against him was "overwhelming."<sup>132</sup> As the dissent pointed out, the prosecutor's case was based largely on the questionable eyewitness identification of *Darden* by two strangers.<sup>133</sup> However, for present purposes the significant point is that the majority failed to even mention that the trial judge made statements on the record about *Darden*'s demeanor while testifying. The trial judge noted that *Darden*'s demeanor strongly suggested he was telling the truth when he denied being involved in the crime and testified that he was in another location.<sup>134</sup> Of course, this was not evidence under the four-sources conception.<sup>135</sup>

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it is necessarily evidence. Yet, under the four-sources conception, this assumption is incorrect; even nonevidence, such as the hypothesis offered in an attorney's argument, may be considered as bearing on a disputed proposition. If the legitimacy of the trier's consideration of information defined the boundaries of evidence, the word "evidence" in the legal context would mean what it means in general parlance, and even attorney arguments, for example, would be considered evidence.

126. 477 U.S. 168 (1986).

127. See *id.* at 170.

128. See *id.* at 179-80. "That argument deserves the condemnation it has received from every court to review it." *Id.* at 179.

129. See *id.* at 181 (citing *Donnelly v. Dechristoford*, 416 U.S. 637 (1974)).

130. See *id.* at 182 (noting that the defense did not present a witness other than petitioner).

131. See *id.* at 200 (Blackmun, J., dissenting).

132. See *id.* at 182 (citing the trial court's decision).

133. See *id.* at 197-99 (Blackmun, J., dissenting).

134. See *id.* at 200 (Blackmun, J., dissenting). "The trial judge who had seen and heard *Darden* testify found that he 'emotionally and with what appeared on its face to be sincerity, proclaimed his innocence.'" *Id.* (Blackmun, J., dissenting).

135. Sometimes demeanor information is said to have a limited evidentiary value as "credibility evidence," but it does not classify as evidence under the terms of typical

Yet, failure to consider it in deciding whether the prosecutor's closing argument affected the outcome—as the majority's opinion suggested it failed to do—was to commingle the four-sources conception with the broader conception under which nonevidence is not legitimately weighed.<sup>136</sup>

Mixing of the two conceptions also occurs in claims questioning the propriety of a nonevidence instruction from the trial judge as a remedy for a lawyer's erroneous summation. The problem is the tendency of courts to rely on the standard instruction indicating that the arguments of counsel are not evidence as a cure for improprieties in attorney arguments.<sup>137</sup> When a lawyer only mistakenly recounts what one of the witnesses has asserted, the trial judge appropriately advises jurors that the jurors' memories of the testimony controls.<sup>138</sup> However, while in practice in Washington, D.C., I saw trial judges on several occasions decline to give more than an instruction that "the arguments of counsel are not evidence" to remedy a variety of improper arguments by prosecutors such as inflammatory appeals to fear of crime, denigration of defense counsel, and expressions of personal opinions on the credibility of witnesses.<sup>139</sup> Likewise, the District of Columbia Court of Appeals has frequently pointed to this standard instruction as a cure for such improprieties.<sup>140</sup> Under the four-sources conception,

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136. While the majority did not explicitly state that the trial court's statements were entitled to no consideration, its opinion conveyed that message. If Darden came across as credible, the case was only genuinely described as close because the government bore a high burden of proof and its witnesses provided far from indisputable testimony indicating Darden's guilt. Based in part on the statements by the trial judge regarding Darden's demeanor as a witness, four members of the Court concluded that the prosecutor's improper summation could well have affected the jury's decision. *See Darden*, 477 U.S. at 189-97 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, J.J.).

137. *See supra* notes 86-90 and accompanying text.

138. *See supra* notes 86-90 and accompanying text.

139. I do not mean to suggest that only prosecutors made improper arguments, but I point to such instances because only prosecutorial errors were typically the subject of claims analyzed by the court of appeals.

140. *See, e.g., Hammill v. United States*, 498 A.2d 551, 558 (D.C. 1985) (rejecting the defense's argument that the prosecutor violated due process in denigrating defense counsel's calling of a child witness; in imputing to defense counsel a belief that an aspect of the defense was not worth arguing; and in injecting prosecutor's own opinions on witness credibility because the trial court instructed the jury in its general charge that the prosecution had carried the burden of proof and "counsel's arguments were not evidence"); *Fernandez v. United States*, 375 A.2d 484, 486 (D.C. 1977) (rejecting a claim based on a highly inflammatory argument by prosecutor regarding social ills caused in the District of Columbia from crimes like the defendant's because "the

an instruction that the argument of counsel is not evidence does not mean that the argument of counsel should be ignored.<sup>141</sup> Many things are not evidence under the four-sources conception—including counsel's argument—but the jury may still weigh them in resolving a disputed proposition. On the other hand, for the Court of Appeals to point to such an instruction as a remedy for improper argument is to suggest that anything that is not called evidence should not be considered, which accords with the meaning of evidence under the inconsistent, broader conception. After evidence is defined according to the four-sources conception, to advocate the notion that evidence means everything that is appropriately considered is to transmogrify the two conceptions into an insensible hybrid.<sup>142</sup>

This last point also shows why the standard instructions implementing the four-sources conception confuse jurors. The delineation of "what is" from "what is not" evidence in these instructions does not aim to separate what jurors can consider.<sup>143</sup> Jurors are supposed to consider, for example, the background knowledge that they bring to the trial and the lawyers' opening statements and summations although this information is not evidence under jury instructions. Lay jurors attempting to follow the instructions may not understand that some nonevidence can be weighed along with evidence. Some jurors might well conclude, based on the meaning of evidence in normal parlance and the seemingly contradictory nature of some of the instructions,<sup>144</sup> that only evidence as defined by the instructions should be considered or, in any event, given significant weight. This confuses the two

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court's instruction in its final charge to the jury that argument of counsel was *not* evidence came immediately after the summation, and hence provided an antidote to its inflammatory character") (emphasis in original); see also *Darden*, 477 U.S. at 182 (rejecting challenge to outrageously inflammatory summation by prosecutor, in part, because "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence").

141. See *supra* notes 86-90 and accompanying text (discussing pattern instructions similar to those employed in the District of Columbia).

142. A view that the instruction conveys to the jury that it should not give any weight to the closing arguments also raises constitutional questions. The Sixth Amendment guarantees the right to have the trier free to consider one's summation in both jury and nonjury trials. See *Herring v. New York*, 422 U.S. 853 (1975); *Thomas v. United States*, 473 A.2d 378 (App. D.C. 1984).

143. See *supra* notes 86-90 and accompanying text.

144. As for the apparent contradiction in some pattern instructions, see *supra* notes 86-90 and accompanying text.

conceptions of evidence and is not what those instructions are intended to accomplish. Yet, if appellate courts assert that jury instructions mean that even attorney arguments should be disregarded, we should not wonder that jurors arrive at the same interpretation.

This pervasive confusion of the two conceptions also complicates efforts to discuss the proof process. An important article by Professor Ronald Allen, entitled *Factual Ambiguity and a Theory of Evidence*,<sup>145</sup> underscores this problem. In the article Professor Allen notes that the "conventional [four-source] theory of . . . evidence"<sup>146</sup> fails to account for several kinds of evidence.<sup>147</sup> As examples, he points to the demeanor of witnesses, rules of deduction, and the knowledge and intelligence a fact finder must employ to convert into propositions what is admitted into evidence.<sup>148</sup> On the view that a "theory of . . . evidence should allow us to speak fully about how triers find facts," Professor Allen argues that evidence must "reduce[] to the proposition that a disinterested fact finder reconstructs the past based on all the observational inputs available at the moment of judging."<sup>149</sup>

Professor Allen uses the term "evidence" to connote two different concepts. This is proper because lawyers use evidence to convey these two inconsistent ideas. Lawyers use evidence to signify under the four-sources conception what we recognize to be a limited part of the input upon which the fact finder relies. We also sometimes think of evidence as embodying all of the input that the fact finder considers. Nonetheless, this usage will appear odd to the reader who fails to recognize that evidence has dual meanings, and because we frequently combine the two conceptions into an insensible hybrid, we can easily overlook their separate identities.

My second and more fundamental point is that Professor Allen's conclusion warrants debate. By the term "evidence," he concludes, we should refer to the all-encompassing conception of evidence rather than to the restrictive, four-sources conception. In confronting our confusion about what we mean by evidence, the very question to explore is how we should conceptualize evidence. Of course, abandoning one or the other conception would avoid

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145. See Allen, *supra* note 101.

146. *Id.* at 616.

147. See *id.*

148. See *id.* at 616-17.

149. *Id.* at 627-28.



intermingling them into a nonsensical hybrid. Which conception, if either, should go? We now turn to that question.

## V. CONFRONTING THE INTERMINGLING PROBLEM

No easy remedy exists for the confusion about the nature of legal evidence. Assuming we could suddenly transform legal dialogue, we would do better choosing the broad conception of evidence over the restrictive conception. However, a sudden transformation of our dialogue is unlikely, and even a gradual movement towards a unitary conception is implausible. Based on this view, we can only avoid confusion by recognizing the dual conceptions and by striving to avoid such intermingling.

If we could transform legal discourse, the broad conception of legal evidence would appear more attractive than the four-sources conception because the broad conception corresponds with the meaning of evidence in general parlance. The discussion in Part IV implied that the broad conception of legal evidence interferes with the dominant four-sources conception.<sup>150</sup> Yet, this restrictive notion itself is the problem. After all, it is strange to conclude that a trier can rationally find facts not revealed by evidence. However, that result occurs under the four-sources view of evidence.<sup>151</sup> This is odd because our expectation is that evidence should encompass all of the legitimate informational input for reaching a factual finding.

One might argue that the broad notion of legal evidence, rather than the four-sources conception, would better serve us for reasons beyond its mere alignment with our sense of what evidence means from a nonlegal context. For example, defining evidence to include all of the legitimate operational input affecting the fact finder could also underscore the importance of the overall process, causing us to expand our focus in law school teaching. Likewise, opting for the all-encompassing view of evidence might be thought to enhance our ability to understand and carry on dialogue about that broader proof process. Further, one might contend that viewing evidence broadly could stimulate valuable reform in the way that trial courts instruct jurors. Instead of limiting

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150. See *supra* Part IV.

151. See *supra* text accompanying note 15 (discussing *Dixon* case and noting that, while the *Dixon* jurors were authorized to acquit merely on finding that the government had not met its heavy burden of proof, they actually found the facts to have been as the defense had hypothesized).

the juror's consideration to only certain sources, the trial judge might simply warn jurors against considering particular information that the court deems inappropriate. This approach would avoid conveying a definition of evidence that misleads jurors about what they may consider.<sup>152</sup>

On inspection, these additional arguments for the broad conception carry marginal, if any, force. The argument that the broad conception of evidence could encourage expanded law school teaching about proving facts essentially harkens back to the greater potential for confusion posed by the four-sources conception. As long as we remember that the four-sources conception of evidence does not encompass important informational input in fact finding, adhering to that conception does not obscure the importance of the larger proof process. Similarly, the value of the broad view to discussions of the proof or fact finding process is lost if other terms allow us to easily reference the larger process. As this discussion itself underscores, appropriate terms exist: "proof from the perspective of the lawyer and "fact finding" from the perspective of the trier.<sup>153</sup> Finally, the notion that courts should simply avoid defining evidence when instructing jurors, and instead describe things they want jurors to ignore, also does not require abandoning the four-sources conception of evidence. As long as we remember the four-sources conception does not equate with the boundaries of legitimate proof, there is no impediment to proceeding in that manner.<sup>154</sup>

We should also concede that abandoning the four-sources view of evidence in favor of the more all-encompassing conception would involve some opportunity costs. The distinctions drawn by the four-sources conception are not worthless. Evidence, as conceived by the restrictive view, delineates the central fund of new data that the fact finder processes. It does not encompass all of the data or even all of the new data upon which the fact finder legiti-

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152. See *supra* text accompanying note 144.

153. See, e.g., WIGMORE, *supra* note 79, at 2-3 (describing the larger process, from the lawyer's perspective, as one of "proof"); Twining, *supra* note 105, at 25 (using the terms "Evidence, Proof and Factfinding" to describe a course embodying rules of evidence but also the larger process).

154. Proceeding in this way, however, would raise new dilemmas. To describe only a few things to be ignored would abrogate the effort to provide accurate guidance to jurors about what they should and should not consider. To describe all of the information that might be available to jurors but that the court would want them to ignore, however, involves extensive and highly complex directives.

mately relies. For example, it does not encompass attorney arguments although the arguments may provide new data in the form of hypotheses, inferences, and analogies influencing the trier's findings.<sup>155</sup> Still, the distinction, subscribed to by scholars like Thayer and Wigmore, has come to have some shorthand, expressive value.

These points lead back to the contention that we should favor a broad conception of legal evidence simply because, over the long run, we would more likely adhere to it than to the four-sources conception. The advantage of the broad conception is that it conforms to our sense of what evidence means in nonlegal discourse. The disadvantage of the four-sources conception is that it departs from that broad conception and does so to express an idea that is not very important, making it difficult to maintain as a distinct idea. Hence, if we could start afresh, we should view evidence as signifying all of the informational input that legitimately influence the fact finder at the moment of decision.

We should also concede, however, that conceiving of evidence as coterminous with legitimate proof—the broad conception—implicates serious potential for confusion. The difficulty is that there are multiple reference points for determining what is legitimate proof and no single answer as to which reference point should be employed. Who should decide what influences are “legitimate?” As between a court and jurors, it might initially appear that the court should decide. This accords with having the judge initially filter the information to which we expose jurors and then give limiting instructions regarding how jurors should employ the information they possess. However, even as between a court and jurors, the problem becomes more complicated once we realize that a trial judge cannot limit jurors’ exposure to influences deemed legitimate by the courts nor give precise instructions about what information in the jurors’ possession they may consider. We must also recognize that jurors do not have to follow the limiting instructions they are given. The question, therefore, remains whether evidence should include all of the influences jurors con-

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155. See Levin & Levy, *supra* note 22, at 139 (discussing limits on the introduction of new facts and ideas in attorney summation); *supra* text accompanying notes 14-15.

Relegating attorney arguments to the less important status of nonevidence also conveys positivist assumptions, not entirely satisfying, about a shared, normative ability to come to particular factual conclusions about the past based merely on the data encompassed by the four-sources conception. See WIGMORE, *supra* note 66, at 6-7 & n.3 (editorial comments of Professor Peter Tillers).

clude are relevant or only those influences the court deems legitimate. To conclude that evidence encompasses everything that might influence the jurors is to ignore the court's effort to limit what the jurors consider. To conclude that evidence encompasses only what the trial judge deems appropriately considered, however, is to ignore the actual process through which jurors find facts.<sup>156</sup>

The problem with attempting to identify a single perspective for determining legitimacy is that we can beneficially see evidence from multiple perspectives depending on the question we seek to answer. If we want a theory of evidence that corresponds to a jury's fact finding process at trial, we must understand evidence as encompassing all of the input that influences the jury's decision.<sup>157</sup> If we want a theory of evidence that describes appellate review as we currently have it, evidence must be perceived from the perspective of the courts; a court's view of what is legitimately weighed will frequently differ from that of the jury.<sup>158</sup> If we want

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156. Consider the psychological impact on a jury of the order in which witnesses testify or the demeanor and appearance of the attorneys during the proceedings. These factors may well affect a juror's ultimate view of the facts. The Supreme Court has even guaranteed that criminal defendants will maintain limited control over the order in which defense witnesses will appear and over whom to retain as defense counsel. Regarding the defendant's right to control the order in which defense witnesses testify, see *Brooks v. Tennessee*, 406 U.S. 605 (1972), and Professor Peter Westen's incisive comments on the case in *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CAL. L. REV. 935, 975-79 (1978). As for the defendant's limited right to retain counsel of his choice, see generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 547-51 (2d ed. 1992).

Do these variables constitute evidence under the broad conception? If evidence is viewed as the process by which the jurors reach a factual decision, including all of the operational input that affects the conclusion, these factors may qualify from the perspective of some jurors. However, from the perspective of a court reviewing a case to determine, for example, whether an alleged error was rendered inconsequential by the evidence, these surely will not be deemed legitimate factors. A reviewing court would be unlikely to absorb these influences if it only perused a cold record and, in any event, could not readily determine their effects on particular jurors. Furthermore, even if those effects could be determined, the reviewing court might hold a different view of their value than particular jurors and, further, might believe that its own assessment should control. Thus, the problem: The broad conception of evidence means different things depending on who is deemed the fact finder or on whose perspective we rely to determine legitimacy.

157. See Allen, *supra* note 101, at 627-28.

158. For a variety of reasons, a court may view what is appropriately considered proof differently than a jury, particularly if the proof is to be articulated in a written opinion. For example, an appellate court might concede that jurors are unavoidably influenced by the order of defense witnesses or by the demeanor of the lawyers but have a different view of whether those factors should be considered as information

to speak about evidence from the perspective of an outside observer deciding whether the jury's verdict reflects a factually accurate decision, we must take into account all that the observer considers in deciding what occurred. This would include, for example, information that was suppressed by the trial court under the Fourth Amendment but was revealed to the observer during a pre-trial hearing. All of these views of evidence sensibly coexist.

The potential for confusion about what constitutes evidence under the broad conception, however, does not change my conclusion that the broad conception would be preferable to the four-sources conception if we were in a position to choose.<sup>159</sup> The potential for confusion arising under the broad conception arises under any conception of evidence. That potential for confusion arises from ambiguity about the perspective from which we are to decide what is legitimate proof. That kind of confusion arises, for example, when we doubt that a jury should consider the persuasive demeanor of a lawyer in closing argument simply because an appellate court reviewing a sufficiency claim would not consider the lawyer's demeanor. That sort of confusion would plague us even if we consistently followed the four-sources conception of evidence because we would still often need to resolve what constitutes legitimate proof *vis a vis* various fact finders. The potential for confusion associated with the four-sources conception stems from its mere existence and only adds to the potential for confusion over what is legitimate proof. The four-sources conception does not express what should govern a jury, an appellate court, or any other observer in deciding upon the facts in a case. It represents a separate notion of evidence under which evidence does not include all that is appropriately considered. The very problem it poses, how-

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supporting a particular factual view for purposes of resolving certain questions presented to it on appeal. See *supra* note 156 and accompanying text. For an explanation of this difference in views, see Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1363 (1985) (contending that courts aim to promote public acceptance of verdicts as statements about a past event while juries may sometimes only view their decisions as probabilistic statements based on the information available to them).

159. One searching for an ultimate definition of legal evidence that can help resolve what information is appropriately weighed in a particular case would find the definition I advocate here disappointing. The proposed conception does not purport to answer such questions and, indeed, on that score appears circular. However, I believe a brief definition of legal evidence in this more ambitious sense will always remain elusive. Even if we could decide on a single correct perspective from which to define evidence, what we would view as evidence would depend on many factors and our views about those various factors would change over time.

ever, is that we sometimes unthinkingly mix it with the broader conception. Hence, by simply abandoning the four-sources conception, we would eliminate that potential problem.

In the end, however, the solution to our confusion lies more with efforts to achieve clarity in thinking and expression than with efforts to produce a transformation to a unitary conception of evidence. Although the restrictive conception adds little to our discourse and poses much potential for confusion, it has become our dominant definition of evidence. Hence, a transformation, even in the long run, to a broad conception of evidence is unrealistic. The restrictive conception has achieved too much momentum in our thinking about evidence for us to abandon it now.<sup>160</sup>

Despite our inability to abandon the four-sources conception, the confusion attributable to maintaining it is not inescapable. The principle problem lies in our failure to recognize that the four-sources view and the all-encompassing view are distinct conceptions. They embody fundamentally different ideas about the nature of evidence. Simply understanding that we hold dual conceptions and that we have often conflated them can help us avoid confusing them in the future.

#### VI. THE IMPLICATIONS OF RECOGNIZING THE DUAL CONCEPTIONS

Maintaining our separate dual conceptions of evidence has significant consequences for how we understand the proof process. The effort to keep the views separate will not produce facile rules regarding what information a legal fact finder may legitimately consider. Nonetheless, avoiding a confusion of our dual conceptions eliminates a major impediment to clear consideration of such questions. Once we recognize that the four-sources conception of evidence does not trace the boundaries of legitimate proof, we are forced to recognize that fact finders appropriately consider information outside the four-sources conception. We must then directly confront questions about what information the fact finder should weigh.

While we must reorient our discussions about proof, we need not alter all of our current discourse about evidence. Many inquir-

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160. Moreover, the multiple dimensions for understanding evidence under the broad conception would make it important to accept its plural nature and the need for care in thought and expression about it even if we abandoned the four-sources conception. Maintaining the four-sources conception only augments a potential for confusion that already exists.

ies related to evidence only concern what testimony litigants should be able to reveal to a trial fact finder. The confusion on which this Article focuses does not call for changes in our approach to those problems.<sup>161</sup> The problems with which I am concerned arise when the discussion implicates the meaning of "evidence." We confuse two inconsistent views of evidence by suggesting that only a few sources provide evidence while simultaneously concluding that only evidence can legitimately influence fact finders.<sup>162</sup>

Recognizing the dual conceptions has important prescriptive implications in a variety of contexts. Evidence teachers, for example, should attempt to reinforce that what we call evidence under the four-sources conception embodies only a fraction of the information and influences that legitimately cause a trial fact finder to reach particular factual conclusions.<sup>163</sup> Lawyers win cases not simply through their influence on the testimonial data but through their influence on jury selection, their influence on the demeanor of persons before the jury, their presentation order, and their opening statements, questions, and summations. These points can be conveyed through nonstandard approaches such as teaching the rules of testimonial admissibility as part of a much larger course or series of courses that embody a study of trial advocacy and of the processes by which fact finders reach conclusions.<sup>164</sup> Moreover, if the traditional course focusing on admissibility rules is followed, the instructor should at least underscore the limited role of testimonial data compared to the lawyer's persuasive efforts.

Courts confronting alleged trial errors should not confuse evidence as defined under the four-sources conception with the boundaries of legitimate proof.<sup>165</sup> For example, when a lawyer

161. This is true, at least, if we recognize that the personal perspective of the observer has quite a lot to do with relevance determinations. It is important that lawyers and judges be sensitive to the existence of varying perspectives in addressing these problems.

162. This notion misleads young lawyers about the proof process, results in confusing instructions to jurors about the sources of information that they may consider, distorts judicial thinking about the legitimate influences on fact finding, and undermines efforts at discourse about fact finding. *See supra* Part IV.

163. We should also reconsider how we might teach more systematically about the broader proof process. *See supra* notes 105-09 and accompanying text.

164. *See supra* note 109 and accompanying text.

165. For a reviewing court to ask whether a verdict appears rational from the perspective of the trial fact finder is essentially to give up the task of reviewing the rationality of verdicts. Reviewing courts will pursue a sense of what is appropriate proof in a

makes an inflammatory argument in closing summation, courts should not conclude that the error is remedied by an instruction that the summation is "not evidence." The trial judge can only appropriately attempt to remedy the improper argument with an instruction to disregard statements that focus specifically and forcefully on the improper argument.

In deciding whether a jury's verdict was rational or whether an alleged error was harmless, reviewing courts also should not confuse evidence as defined under the four-sources conception with the boundaries of legitimate proof. If the record reveals information conveyed to the trier through a view of an event scene, for example, an appellate court reviewing the rationality of a verdict should not ignore that information merely because it is not evidence under the four-sources conception.<sup>166</sup> The same could be said for information revealed in the trial record, for example, concerning the demeanor of witnesses or a party and, certainly, concerning the attorneys' closing arguments. My purpose in this Article is not to delineate the boundaries of legitimate proof.<sup>167</sup> My purpose is to underscore that we must actually confront these questions. In reaching their factual findings, do jurors legitimately rely on the demeanor of a party sitting at counsel table? Are jurors legitimately influenced by the order in which the lawyers call witnesses? Do jurors in a criminal case appropriately rely on their own sense that police officers are prone, when necessary, to testify falsely? Should an appellate court ignore these factors in drawing factual conclusions even if it thinks the jury was appropriately influenced by them? These are questions not appropriately answered merely by determining whether the influences involved constitute evidence under the four-sources conception.

Courts should also reconsider whether jury instructions describing evidence in accordance with the four-sources conception are preferable to simply telling jurors to avoid considering certain information and to consider other information in only limited

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case that differs from that pursued by the trial fact finder. *See supra* text accompanying note 158. Nonetheless, where information is available to the appellate judges that supports a verdict but that does not qualify as evidence under the four-sources conception, the appellate court should not automatically exclude that information from its consideration. *See supra* text accompanying notes 111-25 (discussing cases in which demeanor information and view information was revealed to reviewing judges).

166. *See, e.g., supra* text accompanying notes 118-25.

167. The boundaries of legitimate proof should be different depending on who is serving as the fact finder and the nature of the decision to be made. *See supra* notes 156-58 and accompanying text.



ways. This latter approach to jury instructions raises certain dilemmas about how much to tell jurors regarding improper considerations.<sup>168</sup> Nonetheless, I believe it would be better, and certainly no worse, than the approach we now typically follow. Our typical, current jury instructions regarding the nature and function of evidence are hopelessly contradictory.<sup>169</sup>

## VII. CONCLUSION

Lawyers often mishandle problems that implicate the meaning of evidence. The problem arises because we hold dual conceptions of evidence. On the one hand, we are dominated by a restrictive, four-sources conception under which only a few designated sources provide evidence but under which we recognize that the fact finder also relies heavily on nonevidence to find facts. On the other hand, we are influenced by the notion followed in general parlance that evidence embodies all of the legitimate input that produces a factual conclusion. The problems result when we confuse these two separate conceptions into an illogical hybrid. We think of the four-sources conception as specifying what qualifies as evidence. Yet, based on our conception of evidence from nonlegal discourse, we conclude that the evidence embodies all that properly influences the fact finder. The four-sources conception comes to signify, erroneously, the boundaries of what we view as legitimate proof.

If we could choose between the two views, we would best abandon the four-sources notion in favor of the more all-encompassing conception. The basis for this conclusion is simply that the four-sources conception embodies a view that is difficult to maintain consistently because it departs from our sense of what evidence means in ordinary discourse, and it does so to represent an idea of little value. Hence, assuming it were possible to transform legal discourse, we could more easily find conceptual unity behind the all-encompassing notion of evidence than the four-sources conception.

The solution to our confusion over the meaning of evidence,

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168. To describe only a few things to be ignored would abrogate the effort to provide accurate guidance to jurors about what they should and should not consider. To describe all of the information that might be available to jurors but that the court would want them to ignore, however, involves extensive and highly complex directives.

169. For the approach that we now typically follow, see *supra* notes 86-89 and accompanying text.

however, lies more with efforts to achieve clarity in thinking and expression than with a transformation to a unitary conception. Movement toward the broad conception of legal evidence is unlikely. Appreciating that we currently hold dual conceptions of evidence and recognizing how we have often conflated them is the most important step that we can take to avoid confusing them in the future.

